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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 174.

EDWARD H. REYNES, SOLE SURVIVING ASSIGNEE OF CHARLES CAVAROC & SON, BANKRUPTS, APPELLANTS,

vs.

FREDERIC DUMONT, AUGUST HENRY REINE, JEAN DAVID MOCKEL, AND CHARLES M. FRY, TRUSTEE IN BANKRUPTCY OF SCHUCHARDT & SONS.

No. 175.

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vs.

CHARLES M. FRY, TRUSTEE IN BANKRUPTCY OF SCHUCHARDT & SONS, AND EDWARD H. REYNES, SOLE SURVIVING ASSIGNEE OF CHARLES CAVAROC & SON, BANKRUPTS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 21, 1885.

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1 The President of the United States of America to Charles M. Fry, trustee of Schuchandt & Sons, bankrupts; Francois Laborde and E. H. Reynes, assignees of Charles Cavaroc & Son, bankrupts; the Louisiana National Bank of New Orleans, and N. W. Casey, receiver of the New Orleans National Banking Association, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit *court*, in equity, on the first Monday of August, A. D. 1877, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Frederic Dumont, August Henry Reine, and Jean David Mockel, citizens of the city of Havre, in the Republic of France, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, on the fourteenth day of June, in the year one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the hundred and first.

JOHN I. DAVENPORT, *Clerk.*

EDGAR A. HUTCHINS,
Complainants' Solicitor.

2 The defendants are required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of August, 1877, or the bill will be taken *pro confesso* against them.

[L. S.] J. I. D., *Clerk.*

Circuit Court of the United States for the southern District of New York.

To the Honorable Alexander S. Johnson, judge of the circuit court of the United States for the southern district of New York:

Frederic Dumont, August Henry Reine, and Jean David Moekel, citizens of the city of Havre, in the Republic of France, bring this their bill of complaint against Charles M. Fry, of the city of New York and a citizen of the State of New York, trustee of Schuchardt & Sons, bankrupts; Francois Laborde and E. H. Reynes, of the city of New Orleans and citizens of the State of Louisiana, assignees of Chas. Cavaroc & Son, bankrupts; The Louisiana National Bank of New Orleans and in the city of New Orleans and State of Louisiana, and N. W. Casey, of the city of New Orleans and a citizen of the State of Louisiana, receiver, under the laws of the United States, of the New Orleans National Banking Association; and thereupon your orators complain and say—

That your orators are the lawful owners of two hundred and thirty-two bonds of the city of New Orleans, each for the amount of one thousand dollars, being in the aggregate two hundred and thirty-two thousand dollars, which at the time of the adjudication of Schuchardt & Sons as bankrupts were in the possession of the said Schuchardt & Sons, and are now in the possession of their trustee in bankruptcy, the above-mentioned Charles M. Fry, in the city of New York, who also holds money received from the sale of the coupons attached to the said bonds, amounting to more than thirty thousand dollars; that your orators have frequently and
3 more than twenty days since requested the said Charles M. Fry, trustee as aforesaid, to deliver to them the said bonds and the money received as aforesaid from the sale of the coupons of the said bonds; that he has neglected and refused to pay or deliver the same to them or any part thereof and claims to hold the same as collateral security for sums alleged and pretended to be due to him from the said Francois Laborde and E. H. Reynes, assignees as aforesaid of C. Cavaroc & Son, and from the said N. W. Casey, receiver of the New Orleans National Banking Association; that your orators deny that the said bonds or coupons were hypothecated as security for the said indebtedness, and allege that as to the indebtedness of the New Orleans Banking Association there was deposited on December 16, 1873, and still remains deposited, in the Union Bank of London the sum of seven thousand and eighty-eight pounds nineteen shillings and ten pence, which belongs either to the said Charles M. Fry, trustee as aforesaid of Schuhardt & Sons, or to the said N. W. Casey, receiver of the New Orleans National Banking Association, and should be credited in the adjustment of their account and applied to the reduction of the alleged indebtedness for which the said Charles M. Fry, trustee as aforesaid, claims or pretends to claim to hold the aforesaid bond as security.

That your orators are informed that the said Francois Laborde and E. H. Reynes, assignees of C. Cavaroc & Son, the Louisiana National Bank of New Orleans, and N. W. Casey, receiver of the New Orleans National Banking Association, claim to have liens upon the said bonds or some portion thereof or claims affecting the said bonds, the exact amount of which your orators are ignorant of and the validity of which your orators dispute.

In consideration whereof and forasmuch as your orators can have no adequate relief except in a court of equity, and to the end that the said defendants may, if they can, show why your orators
4 should not have the relief prayed for herein, and may, on their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises, and to the following interrogatory—that is to say:

Whether the said defendants or either of them have any right, title, interest, lien, or demand of, in, to, or affecting the aforesaid two hundred and thirty-two bonds of the city of New Orleans of the denomination of one thousand dollars each, and the aforesaid money

received from the sale of the coupons of the said bonds or any part of the said bonds or of the said money.

And that the said Charles M. Fry, trustee as aforesaid of Schuchardt & Sons, may be adjudged and decreed to deliver over to your orators the said bonds and the money in his hands as aforesaid as proceeds from the sale of the coupons of the said bonds.

And that the right of the said Charles M. Fry, trustee as aforesaid of Schuchardt & Sons, and N. W. Casey, receiver of the New Orleans National Banking Association, to the money deposited as aforesaid in the Union Bank of London may be settled and applied by this court to the proper account to which it may belong, and that due process of injunction and other process may be issued as may hereafter appear necessary or advisable.

And that your orators may have such other and further relief in the premises as the nature of the circumstances in this case may require and to this honorable court may seem meet.

And may it please your honor to grant to your orators a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Charles M. Fry, trustee of Schuchardt & Sons, bankrupts; Francois Laborde and E. H. Reynes, assignees of Charles Cavaroc & Son, bankrupts; the Louisiana National Bank of New Orleans and N. W. Casey, receiver of the New Orleans National Banking Association, commanding them, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and stand to, perform, and abide such further order, direction, and decree as may be made against them.

And your orators will ever pray, &c.

EDGAR A. HUTCHINS,
Solicitor and of Counsel for the Complainants.

Endorsed: U. S. circuit court, southern district of New York. Frederic Dumont *et al. vs.* Charles M. Fry, trustee of Schuchardt & Sons, bankrupts, *et al.* Bill of complaint. E. A. Hutchins, complainants' solicitor. U. S. circuit court. Filed June 14, 1877. John I. Davenport, clerk.

Circuit Court of the United States for the Southern District of New York.

To the Honorable Alexander S. Johnson, judge of the circuit court of the United States for the southern district of New York:

Frederic Dumont, August Reine, and Jean Moekel, citizens of the city of Havre, in the Republic of France, bring this their bill of complaint against Charles M. Fry, of the city of New York and a citizen of the State of New York, trustee of Schuchardt & Sons, bankrupts; Francis Laborde and E. H. Reynes, of the city of New Orleans and citizens of the State of Louisiana, assignees of Chas. Cavaroc & Son, bankrupts; The Louisiana National Bank of New

Orleans, and in the city of New Orleans and State of Louisiana, and N. W. Casey, of the city of New Orleans and a citizen of the State of Louisiana, receiver, under the laws of the United States, of the New Orleans National Banking Association; and thereupon your orators complain and say—

That your orators are in equity the joint owners with the defendants, Francis Laborde and E. H. Reynes, assignees of C. Cavaroc and Son, bankrupts, of two hundred and thirty-two bonds of the city of New Orleans, each for the amount of one thousand dollars, being in the aggregate two hundred and thirty-two thousand dol-
7 lars, which, at the time of the adjudication of Schuchardt & Sons as bankrupts, were in the possession of the said Schuchardt & Sons, and are now in the possession of their trustee in bankruptcy, the above-mentioned Charles M. Fry, in the city of New York, who also holds money received from the sale of the coupons attached to the said bonds, amounting to more than thirty thousand dollars.

That these bonds were purchased by C. Cavaroc and Son with the money of your orators for the joint account of your orators and said C. Cavaroc and Son, but not in the name of your orators nor in the joint names of your orators and of C. Cavaroc and Son; that for this reason your orators are unable to enforce their claims to these bonds in a suit at law and are compelled to seek relief in a court of equity.

That your orators have frequently and more than twenty days since requested the said Charles M. Fry, trustee as aforesaid, to deliver to them the said bonds and the money received as aforesaid from the sale of the coupons of the said bonds; that he has neglected and refused to pay or deliver the same to them, or any part thereof, and claims to hold the same as collateral security for the sums alleged and pretended to be due to him from the said Francois Laborde and E. H. Reynes, assignees as aforesaid of C. Cavaroc & Son, and from the said N. W. Casey, receiver of the New Orleans National Banking Association.

8 That your orators deny that the said bonds or coupons were hypothecated as security for the said indebtedness and allege that as to the indebtedness of the New Orleans Banking Association there was deposited on December 16, 1873, and still remains deposited in the Union Bank of London the sum of seven thousand and eighty-eight pounds nineteen shillings and ten pence, which belongs either to the said Charles M. Fry, trustee as aforesaid of Schuchardt & Sons, or to the said N. W. Casey, receiver of the New Orleans National Banking Association, and should be credited in the adjustment of their account and applied to the reduction of the alleged indebtedness for which the said Charles M. Fry, trustee as aforesaid, claims or pretends to claim to hold the aforesaid bond as security; that for the proper determination of the rights of your orators it would be necessary to examine into the accounts of the dealings between your orators and the said firm of C. Cavaroc and Son, by whom the said bonds were bought on joint account with your orators, and also between the said firm of C. Cavaroc and Son and the

New Orleans National Banking Association and the said firm of F. Schuchardt and Sons, in the examination of which it would be necessary to have discovery of the books and papers of the respective parties and to ascertain as to the existence and extent of certain equitable trusts therein.

That your orators cannot obtain adequate, specific, and perfect relief by any actions at law, and such relief as they can obtain
9 could only be obtained by bringing separate suits against the defendants above named, thus involving a multiplicity of suits, to avoid the burden of which your orators ask the intervention of this court of equity.

That all the defendants above-named, except the Louisiana National Bank of New Orleans, are trustees under the laws of the United States and are for that reason within the jurisdiction and subject to the supervision of this court in equity.

That your orators are informed that the said Francois Laborde and E. H. Reynes, assignees of C. Cavaroc & Son, the Louisiana National Bank of New Orleans, and N. W. Casey, receiver of the New Orleans National Banking Association, claim to have liens upon the said bonds or some portion thereof or claims affecting the said bonds, the exact amount of which your orators are ignorant of and the validity of which your orators dispute.

In consideration whereof and forasmuch as your orators can have no adequate relief except in a court of equity, and to the end that the said defendants may, if they can, show why your orators should not have the relief prayed for herein, and may on their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises and to the following interrogatory—that is to say:

10 Whether the said defendants or either of them have any right, title, interest, lien, or demand of, in, to, or affecting the aforesaid two hundred and thirty-two bonds of the city of New Orleans of the denomination of one thousand dollars each, and the aforesaid moneys received from the sale of the coupons of the said bonds or any part of the said bonds or of the said money.

And that the said Charles M. Fry, trustee, as aforesaid of Schuchardt & Sons, be adjudged and decreed to deliver over to your orators the said bonds and the money in his hands as aforesaid as proceeds from the sale of the coupons of the said bonds.

And that the said defendants, Francois Laborde and E. H. Reynes, assignees of Charles Cavaroc & Son, may set forth an account of all and every sum and sums of money received and expended by them and by the said C. Cavaroc & Son, or by any person or persons by their order or that of either of them, on account of which they have an interest in or claim to the said bonds or any portion of them, and when and from what in particular all and every such sums were respectively received, and how the same respectively have been disposed of.

And if it shall appear to this honorable court that the defendant,

Charles M. Fry, trustee of Schuchardt & Sons, bankrupts, has any right to hold the said bonds as collateral security for any indebtedness of any one, that he may set forth a full account of all
11 the items of the indebtedness for which he claims to so hold these bonds as security.

And that the right of the said Charles M. Fry, trustee as aforesaid of Schuchardt & Sons, and N. W. Casey, receiver of the New Orleans National Banking Association, to the money deposited as aforesaid in the Union Bank of London may be settled and applied by this court to the proper account to which it may belong, and that due process of injunction and other process may be issued as may hereafter appear necessary or advisable.

And that your orators may have such other and further relief in the premises as the nature of the circumstances in this case may require and to this honorable court may seem meet.

And may it please your honors to grant your orators a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Charles M. Fry, trustee of Schuchardt & Sons, bankrupts; Francois Laborde and E. H. Reynes, assignees of Charles Cavaroc & Son, bankrupts; the Louisiana National Bank of New Orleans, and N. W. Casey, receiver of the New Orleans National Banking Association, commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises and stand to, perform,
12 and abide such further order, direction, and decree as may be made against them.

And your orators will ever pray, &c.

EDGAR A. HUTCHINS,
Solicitor and of Counsel for Complainants.

(Endorsed:) U. S. circuit court, southern district of New York. Frederic Dumont and others against Charles M. Fry and others. Amended bill of complaint. Edgar A. Hutchins, complainants' sol'r, 56 Wall St., N. Y. U. S. circuit court. Filed Jul. 19, 1882. Joseph M. Deuel, clerk.

13 Circuit Court of the United States for the Southern District of New York.

FREDERICK DUMONT *et al.*
vs.
CHARLES M. FRY, Trustee, &c., *et al.*

The answer of Francois Laborde and E. H. Reynes, assignees in bankruptcy of Charles Cavaroc, Sr., and Charles Cavaroc, Jr., doing business under the firm of C. Cavaroc & Son, to the bill of complaint of Frederick Dumont, August Henry Reine, and Jean David Moekel, complainants.

These defendants, now and at all times saving and reserving to

themselves all and all manner of benefit of exception to the many errors, uncertainties, and imperfections in the complainants' bill of complaint contained, for an answer thereunto, or unto so much thereof as they are advised it is material for them to make answer unto, answer and say:

1. On December 24th, 1875, at New Orleans, the said Charles Cavaroc, Sr., and Charles Cavaroc, Jr., as partners under the
14 firm of C. Cavaroc & Son and individually, were by the district court of the United States for the district of Louisana, of which they were residents, duly adjudicated bankrupts pursuant to the act of Congress in such case made and provided. On February 26, 1876, these defendants were by the said court appointed assignees of all the estate of the said bankrupts, including all property of which they were possessed or in which they were interested on December 23, 1875, and the same was duly assigned to them. The petition upon which such adjudication was made was filed in the said district court on December 23, 1875.

2. The said 232 bonds of the city of New Orleans and money received from the sale of coupons thereof to the amount of over $32,000 were in the possession of Schuchardt & Sons at the time they were adjudicated bankrupts, and are now in the possession of the said Charles M. Fry as their trustee. More than twenty days before the commencement of this suit a demand for the same was made upon the said Charles M. Fry both by the complainants and also by these defendants, and with each such demand the said Charles M. Fry, as such trustee, declined to comply.

3. These defendants deny that the said Charles M. Fry, as such trustee, holds the said bonds and money received from the sale of coupons as collateral security for sums due to the said Schuchardt & Sons, or to him as their trustee, from the said C. Cavaroc & Sons, or from these defendants as their assignees.

4. These defendants have no knowledge or information sufficient to form a belief about the deposit in the Union Bank of London in the bill alleged. They, however, ask that it may be ascertained whether there is any such deposit and what is its amount, and that the said Charles M. Fry, as such trustee, may be compelled to
15 credit the same upon any claims which he may make against said bonds and money received from coupons.

5. As to the claim of the Louisiana National Bank under an attachment against the said C. Cavaroc & Son in an action commenced in the supreme court of the State of New York, these defendants say that they have no knowledge or information sufficient to form a belief about such attachment. At the time alleged for the issuing of the same the said C. Cavaroc & Son were, and by the said Louisiana National Bank and its officers were known to be, insolvent and in contemplation of bankruptcy, and any such attachment was issued for the purpose of obtaining a preference by the said Louisiana National Bank and was void under the act of Congress hereinafter referred to.

6. As to the said 232 bonds and the coupons thereto attached,

these defendants say that they were purchased by the complainant and the said C. Cavaroc & Son on joint account.

The money used for the purchase was obtained from bills of exchange drawn by the said C. Carvaroc & Son upon the complainants and constituted an obligation of the joint account.

The amount, in whole or in considerable part, remains unpaid. These defendants are advised and believe and insist that the said bonds and coupons and their proceeds should be first applied to, and that in law they are chargeable with, the repayment of the money with which they were purchased, and that one-half of the residue of value belongs to these defendants.

If this is not so, then these defendants, as the assignees of C. Cavaroc & Son, are and claim to be half owners of the said bonds and coupons.

7. These defendants ask that this court will adjudicate what was the interest of C. Cavaroc & Son and what is the interest of these defendants in the said bonds, and they deny that any of the defendants have any lien upon or claim against the interest of said bonds of the said C. Cavaroc & Son—

16 Without this, that any other matter or thing in the bill of complaint material or necessary for these defendants to make answer unto and not herein or hereby well and truly answered unto confessed or avoided, traversed or denied, is true to the knowledge, information, or belief of these defendants.

In consideration whereof these defendants, upon information and belief, deny all such matters and things. All of which matters so averred by these defendants they are ready to maintain or prove as this court may direct, and humbly pray to be hence dismissed with their reasonable costs and charges as most unjustly sustained; and, as in duty bound, these defendants will ever pray, &c.

F. LABORDE.
E. H. REYNES.

MAN & PARSONS,
Solicitors for Defendants Laborde & Reynes.
JOHN E. PARSONS, *Of Counsel.*

Sworn to before me this 9th day of November, 1877.
[SEAL.] F. B. VINOT,
U. S. Commissioner for the District of Louisiana.

17 *The Answer of Charles M. Fry,*

Trustee of Frederick Schuchardt & Sons, bankrupts, impleaded with Francois Labord and others, to the bill of complaint of Frederick Dumont, August Henry Reine, and Jean David Moekel, citizens of the city of Havre, in the Republic of France.

The defendant, Charles M. Fry, trustee as aforesaid, now and at all times hereafter saving and reserving to himself all and all manner of benefit and exception to the many errors and uncertainties and imperfections in the complainants' bill of complaint contained,

for answer thereunto, or unto so much thereof as he is advised it is material for him to make answer unto, answers and says—

That he is informed and believes and denies that the complainants are the lawful owners of 232 bonds of the city of New Orleans, which are of one thousand dollars each, referred to in the complaint, or of any of them, but he admits that they were in the possession of Frederick Schuchardt & Sons at the time of their adjudication as bankrupts, and that they are now in the possession of this defendant in the city of New York.

This defendant denies further that he now has or at any time received or holds any moneys from the sale of the coupons attached to said bonds; that, as this defendant is informed and believes, the said Frederick Schuchardt & Sons at the times referred to or which may be referred to in this litigation were bankers, factors, and commission merchants, doing business in the city of New York, and as such acted for Charles Cavaroc & Son, of the city of New Orleans, and the New Orleans Banking Association of the same city,
18 both of which latter concerns have since become bankrupts and are represented by their assignees, the defendants hereto.

That, as this defendant is further informed and believes, the said bonds are negotiable bonds, and were deposited with the said Frederick Schuchardt & Sons as security for any indebtedness or balances of account which at any time might or could arise in the course of their aforesaid dealings in their aforesaid character with the said Charles Cavaroc & Son and the said New Orleans Banking Association.

That the result of the transactions and dealings of the said Frederick Schuchardt & Sons with said parties is that the said Charles Cavaroc & Son are indebted unto the said Frederick Schuchardt & Sons, as of the 9th day of February, in the year 1875, in the sum of 7,704.22 dollars, and the said New Orleans Banking Association are indebted to the said Frederick Schuchardt & Sons as of the 1st day of September, in the year 1875, in the sum of 199,055.00 dollars.

That this defendant claims to hold the aforesaid bonds as security for the payment of the aforesaid indebtedness, and is desirous of having the aforesaid indebtedness adjudicated and settled, and to have the said bonds sold under the direction of this honorable court, and to have the proceeds thereof applied toward the payment of such indebtedness, and to have any balance then remaining due and unpaid adjudicated in favor of this defendant, and decrees rendered therefor.

This defendant, further answering, says that the amount which may be due unto the said Frederick Schuchardt & Sons and to this defendant, as their trustee, from the said Charles Cavaroc & Son may be increased by the result of an action now pending in the supreme court of the State of New York by the defendant, The Louisiana National Bank of New Orleans.

19 This latter action is in two bills of exchange drawn by Charles Cavaroc & Son on Frederick Schuchardt & Sons, one for ten thousand dollars and the other for twenty thousand dollars,

and purchased by the defendants, The Louisiana National Bank of New Orleans.

The action was tried at the circuit — in the city of New York and resulted in a verdict in favor of this defendant on the ten thousand-dollar draft, and in favor of the Louisiana National Bank on the twenty-thousand-dollar draft. From the judgment rendered on this verdict both parties have appealed to the general term of the supreme court, where the action now remains undetermined.

Whatever may be the ultimate recovery in that action against this defendant such recovery, if had, must be added to the aforesaid amount claimed as due from Charles Cavaroc & Son to Frederick Schuchardt & Sons and to this defendant as trustee, and for such additional and further amount this defendant claims to hold the said bonds as security.

This defendant further states, on information and belief, that the said Frederick Schuchardt & Sons, before their bankruptcy and as the bankers, factors, and commission merchants of the defendants, The New Orleans Banking Association, had collected for the said New Orleans Banking Association, in England, the sum of about seven thousand and eighty-eight pounds nineteen shillings and ten pence (£7,088 19*s.* 10*d.*) of principal; that the said amount was collected by the Union Bank of London as the agent of said Frederick Schuchardt & Sons and in the latter's name. The said Union Bank was paid therefor by the said Frederick Schuchardt & Sons and received the said sum of seven thousand and eighty-eight pounds nineteen shillings and ten pence as the bailees of said Frederick Schuchardt & Sons.

That the defendant Casey, as the assignee of the New Orleans Banking Association, has, however, claimed that amount from the Union Bank of London, and the Union Bank of London has declined to pay the same over to Frederick Schuchardt & Sons or to this defendant.

This defendant respectfully prays this court to adjudicate that the said amount should be paid by the Union Bank of London to this defendant, trustee as aforesaid, and the defendant Casey be enjoined from interfering or litigating this defendant's rights thereto, and be decreed to join in all necessary and advisable assurances or releases which the said Union Bank may reasonably require, on the payment over to this defendant of said amount and the accumulations thereon, and that the same be applied towards the payment of the aforesaid indebtedness of the said New Orleans Banking Association to the said Frederick Schuchardt & Sons.

This defendant, further answering, says that the said Frederick Schuchardt & Sons, on or about the 3d day of January, 1874, were the owners and holders of bills of exchange for the sum amounting in all to $43,000, duly accepted by the said plaintiffs, then past due and unpaid; that on this latter date the said Frederick Schuchardt & Sons commenced, in due form of law, an action against the complainants, which is still pending and undetermined, for the recovery thereof, and, pursuant to the statutes of the State of New York, duly attached the interest of the said complainants, if any, in the bonds

referred to in the complaint as security for the payment of any judgment which may be recovered in the said action; and if the said complainants have any interest in said bonds such interest should be applied to the payment of said bills of exchange, and this defendant prays to the court so to decree—

21 Without this, that any other matter or thing in the complainants' bill of complaint material or necessary for this defendant to make answer unto and not herein or hereby well and truly answered unto, confessed or avoided, traversed or denied, is true to the knowledge, information, or belief of this defendant.

All of which matters this defendant is ready to aver, maintain, or prove as this court may direct, and humbly prays to be hence dismissed with his reasonable costs and charges most unjustly sustained.

And the defendant, as in duty bound, will ever pray, &c.

PLATT, GERARD & BOWERS,
Solicitors for Charles M. Fry, Trustee, &c.

The Amended Answer of Charles M. Fry,

Trustee of Frederick Schuchardt & Sons, bankrupts, impleaded with Francis Laborde and others, to the bill of complaint of Frederick Dumont, August Henry Reine, and Jean David Moekel, citizens of the city of Havre, in the Republic of France.

Circuit Court of the United States for the Southern District of New York.

This defendant, Charles M. Fry, trustee as aforesaid, doth further make this his amended answer and say that heretofore, to wit, on the 20th day of September, 1877, he filed his answer to the bill of complaint in this cause, wherein he set up many defenses

22 that he was advised it was necessary for him — make and averred many allegations and made many prayers, all of which defenses, allegations, and prayers he hereby confirms and repeats, saving and excepting only in this, that in said answer this defendant stated, on information and belief, that the said Frederick Schuchardt & Sons, before their bankruptcy and as the bankers, factors, and commission merchants of the defendants, The New Orleans Banking Association, had collected for the New Orleans Banking Association in England the sum of about seven thousand and eighty-eight pounds nineteen shillings and ten pence of principal; that the said amount was collected by the Union Bank of London as the agent of the said Frederick Schuchardt & Sons and in the latter's name.

The said Union Bank was paid therefor by the said Frederick Schuchardt & Sons, and received the said sum as the bailees of the said Frederick Schuchardt & Sons, and saving and excepting only that in said answer this defendant prayed this court to adjudicate that the said amount should be paid by the Union Bank of London to this defendant, trustee as aforesaid, and the defendant Casey be

enjoined from interfering or litigating this defendant's right thereto and be decreed to join in all necessary and advisable assurances or releases which the said Union Bank may reasonably require on the payment over to this defendant of said amount and the accumulations thereon, and that the same be applied toward the payment of the indebtedness of the New Orleans Banking Association to the said Frederick Schuchardt & Sons.

And this defendant avers that, being better informed than at the time of filing the aforesaid answer, he now believes the said allegation in said answer to be untrue in fact, and he withdraws the said prayer in said answer, leaving all other allega-
23 tions and prayers in said answer to remain in full force and effect.

And this defendant, as in duty bound, will ever pray, &c.

CHARLES M. FRY,
Trustee of F. Schuchardt & Sons.
PLATT, GERARD & BOWERS,
Sol'rs for Defendant Fry, Trustee.
JOHN M. BOWERS, *Counsel.*

Sworn to before me this 21st day of October, 1878.

A. G. CLEEK,
Clerk of Bath County Court.

24 United States Circuit Court, South'n District of New York.

FREDERIC DUMONT *et al.*
vs.
CHARLES M. FRY, Trustee, &c., FRANCIS LABORDE, and E. H. REYNES, Assignees, &c., *et al.*

The replication of Frederic Dumont, August Henry Reine,
25 and Jean David Moekel, complainants, to the answers of Charles M. Fry, trustee of Frederic Schuchardt & Sons, and of Francis Laborde and E. H. Reynes, assignees of Charles Cavaroc & Son, bankrupts, defendants.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers, for replication thereunto say that they aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable

court shall direct, and humbly pray as in and by this said bill *their* have already prayed.

EDGAR A. HUTCHINS,
Complainants' Solicitor.

26 Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others
vs.
CHARLES M. FRY, Assignee, and Others.

Interrogatories to be administered to Charles Cavaroc and Charles Cavaroc, Junior, of the city of New Orleans, in the State of Louisiana, witnesses to be produced, sworn, and examined, under and by virtue of the annexed commission, before John Finney, Esq., the commissioner therein named, in a certain cause depending in the circuit court of the United States for the southern district of New York, wherein Frederic Dumont and others are plaintiffs and Charles M. Fry, assignee, and others are defendants, on the part of plaintiffs.

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. Do you know the parties, plaintiff and defendant, in the title of these interrogatories named or either or which of them, and how long have you known them or either and which of them?

Third interrogatory. What business were you engaged in in the years 1870, 1871, 1872, and 1873, and where did you carry on said business? If you were a member of any firm at that time state what was the name of that firm and who were the partners composing it.

Fourth interrogatory. Did you at any time prior to October 1, 1873, deposit with F. Schuchardt & Sons, of the city of New York, 232 bonds of the city of New Orleans of the par value of one
27 thousand dollars each? If so, state what took place at the time when you so deposited them. State fully any and all conversations had by you with any of the members of said firm and produce all letters which you received from said firm or any member thereof, and produce copies of all letters written by you to said firm or any member thereof in reference to said bonds from the time you first deposited them with the said firm to the present time, and if at any conversation had by you with any member of the said firm he made any memorandum in reference to said bonds and delivered it to you, produce said memorandum.

Fifth interrogatory. Were you ever an officer of the National Banking Association of the city of New Orleans? If yea, did that bank have any transactions with Schuchardt & Sons in which anything was done in reference to said 232 bonds, and by whom, and produce any letters which you can written to said bank by Schu-

chardt & Sons or to any officer of the said bank in reference thereto, and produce any letters you can which were written by said bank or any officer thereof to Schuchardt & Sons in reference thereto.

Sixth interrogatory. If in answer to the fourth and fifth interrogatories you shall have produced any papers, state whether or not you are familiar with the handwriting thereof; and, if so, in whose handwriting are they, respectively?

Seventh interrogatory. Are you familiar with the manner of conducting the business of banking and exchange brokerage in the cities of New Orleans and New York; and, if so, how long have you been so familiar?

Eighth interrogatory. Is there any usage among exchange bankers and brokers as to the meaning of a draft "*à déconvert?*" If yea, what does the phrase "*à déconvert*" mean, and how is it used among exchange brokers and bankers?

Ninth interrogatory. Did the New Orleans Banking Asso-
28 ciation become bankrupt in 1873 or about that time; and, if so, when? If yea, did said New Orleans Banking Association at that time owe Schuchardt & Sons anything; and if so, what and on what account? Had there ever been an account "*à déconvert*" between them; and, if so, was that account closed at that time? If it was not closed what was there due on that account? Has anything been paid since; and, if so, on what account?

Tenth interrogatory. Did any firm with which you were connected fail in 1873? If so, when did it fail, and at the time of its failure did it owe Schuchardt & Sons anything; and, if so, what, and on what account? Has anything been paid since on account of such indebtedness; and, if so, how much and on what account? Does that firm or its legal representatives now owe Schuchardt & Sons anything?

Eleventh interrogatory. Were said bonds, previous to their said deposit by you with Schuchardt & Sons, bought by you as brokers or otherwise? If yea, state in what capacity or on whose account and under what agreement, if any, you bought them. If taken in exchange for other securities of the city of New Orleans answer the same questions as to them. State fully,

Twelfth interrogatory. Do you know any other matter or thing touching the matters in question that may lead to the benefit or advantage of the said plaintiff? If so, declare the same fully and at large as if you had been particularly interrogated thereto.

EDGAR A. HUTCHINS,
Plaintiffs' Attorney.

29 Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others
against
CHARLES M. FRY, Assignee, and Others.

Cross-interrogatories to be administered on the part of the defendant, Charles M. Fry, to Charles Cavaroc and Charles Cavaroc, Jr., witnesses to be examined on the part of the complainants in the action and before the commissioner referred to in the preceding interrogatories.

First cross-interrogatory. If you shall testify to any conversations in answer to the fourth interrogatory state where each conversation took place, the date thereof, with whom, and who were present at the time. State separately the words of each conversation, as near as you possibly can.

Second cross-interrogatory. Were you president of the New Orleans Banking Association; if so, from what time to what time? Were you not president in the month of September, 1873? Did you not aid it with the funds and resources of yourself and of your firm? Please to give a brief statement of what you and your firm did in that respect. Did you not preside at a meeting of the officers of that bank held on or about the 20th September, 1873, in which, among other things, a resolution was passed by vote of yourself and other officers as follows:

30 Called meeting.

N. O. NATIONAL BANKING ASSOCIATION,
NEW ORLEANS, *Sept.* 20, 1873.

Present: C. Cavaroc, president; A. Tertron, J. Aldige, John Rocchi, A. A. Mouton, P. S. Wiltz, L. Haas, Jr.

The president stated that the object of the meeting was to inform the board of the unpleasant state of affairs in general, and particularly of the panic actually prevailing in New York. The suspension of Jay Cooke & Co., which was already announced and which no doubt would be followed by many others, would tend to increase the present uneasiness and render our money market still more stringent.

He would therefore ask the board to suggest or adopt such measures as in their judgment they would think expedient to avert the impending crisis. Whereupon it was unanimously

Resolved, That in view of securing the president against any eventual loss of the 7 per cent. city of New Orleans bonds belonging to the firm of C. Cavaroc & Son and actually pledged to Messrs. F. Schuchardt & Sons, agents of the Bank of New York, as collateral security for the payment of all foreign exchange bills entrusted to their care for negotiation and by them indorsed that he be and is

hereby authorized to select as guarantee from the portfolio of the bank such papers as he may think proper to the extent of one hundred thousand dollars.

On motion, it is further

Resolved, That the board hereby tender their thanks to the president for the aid he is individually lending by leaving undisturbed a large cash balance of eighty thousand dollars actually standing to the credit of C. Cavaroc & Son on the books of the bank.

And the board adjourned.

(Signed) C. CAVAROC, *Pres't.*
HENRY BLACHE, *Cashier.*

31 Did or did not you vote for that? Was not that resolution passed? Is or is not the above substantially a copy of such resolution? If not, whence does it differ from the resolution itself? If it does substantially differ state the terms of that resolution yourself. Annex the original resolution to your deposition. If you cannot or will not, state why.

Third cross-interrogatory. Did not you or your firm or the banking association at various times direct Messrs. Schuchardt & Sons to hypothecate or use or pledge or make other dispositions of these bonds or some of them for the benefit of your firm or of the banking association, which directions the said firm followed? State each of such occurrences, with the dates, parties to whom, and the objects thereof. Please to give the dates of the letters of yourself, your firm, and of the banking association directing such use, pledge, or dispositions.

Fourth cross-interrogatory. If you answer the 11th interrogatory state each agreement that you may speak of separately and whether verbal or written. If verbal when and between what persons, and where made. If written annex the same and every writing connected with it. If you shall state that any payment was made to or for you for said bonds or the securities they were taken in exchange for, state when, where, and how such payments were respectively made. State which of such payments were made by cash and which by drawing or redrawing, and whether such redrawings were ultimately paid in cash; and, if so, by whom, when, and where. Were not drafts or bills of exchange drawn by you or by your firm or by the bank on the complainants in this action outstanding at the time of the failure of the banking association and of your firm? State what such drafts or bills of exchange were, and how they originated, and the original consideration or starting thereof, however remote. If you state what said bonds or the securities from which they originated were bought for or on joint account with the com-
32 plainants, state when; how the funds to pay for them were raised; if by bills, give the bills, and then state whether such bills were not provided by redrawing and whether said original bills were ever—and, if so, when and how—paid by the complainants out of their own cash and not with proceeds of redrafts or some similar means.

Fifth cross-interrogatory. Please to state the true origin and con-

sideration of the following bills of exchange drawn by the firm of Cavaroc & Co. against F. Dumont & Co. In the first place, are not the complainants in this action that firm? The following are the bills of exchange we ask you about: Five bills of exchange drawn by C. Cavaroc & Son on F. Dumont & Co., each at 90 days after sight, each dated 4th September, 1873, to order of C. Cavaroc & Son, for 10,000 francs each.

Four bills of exchange drawn by C. Cavaroc & Son on F. Dumont & Co., each dated Sept. 4, 1873, payable 90 days after sight, to the order of C. Cavaroc & Son, for 15,000 francs each.

Two bills of exchange, each dated Sept. 27, 1873, drawn by the firm of C. Cavaroc & Son on F. Dumont & Co., payable to the order of Frederick Schuchardt & Sons, for the sum of 50,000 francs each.

Last cross-interrogatory. Have you heard or can you say or do you know anything relative to the matters in controversy in this action, beyond what you have been interrogated unto, which may be of benefit or advantage to the defendant, Charles M. Fry? If so, please to state the same fully and at large as if you had been particularly interrogated thereunto.

PLATT, GERARD & BOWERS,
Solicitors — Defendant Fry, Trustee.

33 Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT *et al. vs.* CHARLES M. FRY, Assignee.

Interrogatories to be propounded to N. W. Casey, Charles Cavaroc, and Edward Reynes, witnesses to be produced, sworn, and examined, under and by virtue of the annexed commission, in New Orleans, Louisiana, in a certain cause pending in the circuit court of the United States for the southern district of New York, wherein Frederic Dumont and others are plaintiffs and Charles M. Fry, assignee, and others are defendants, on the part of F. Laborde and Edward Reynes, assignees of Charles Cavaroc & Son.

I. What is your age and occupation? Where do you reside?

II. Do you or not know the parties to this suit or either of them; if yea, whom do you know and how long have you known them? Do you know the assignees of the bankrupt estate of Charles Cavaroc & Son; if yea, who are they and where do they reside? Do you or not know anything of 232 bonds of the city of New Orleans, of the par value of $1,000 each, left with or sent to Messrs. Schuchardt & Sons, of the city of New York; if so, who deposited said bonds and for what purpose were they left or deposited with them? What was said and done and written in reference to said bonds? State fully and in detail all that you know in reference to said bonds. Who now has possession of them? Have you had any letters from Messrs. Schuchardt & Sons relative to said bonds? If yea,
34 produce them. If you cannot, state why not and annex copies or state their contents.

III. Do you know whether or not the New Orleans Banking Association or its receivers makes any claim upon said bonds, either as owner or as claiming to have the same, held by F. Schuchardt & Sons as security for any debts or bills? State all that you know on this subject.

IV. Frederic Dumont and others have instituted suit against C. M. Fry, assignee of F. Schuchardt & Sons, for 232 bonds of the city of New Orleans, of $1,000 each, and Messrs. F. Laborde and E. H. Reynes, as assignees of C. Cavaroc & Son, are also claiming said bonds. Do you or not know of any fact showing to whom said bonds belong or who has the right to the whole or any part of the same? If yea, state fully and in detail all you know on this subject. Do you or not know whether the Louisiana National Bank has made any claim against the assignees of Cavaroc & Son, or received any dividend from them on certain drafts alleged to have been drawn on Messrs. F. Schuchardt & Sons, or received any dividend from them on certain drafts alleged to have been drawn on Messrs. F. Schuchardt & Sons; if yea, upon what claims has said bank received dividend and when did it receive the same? State fully all you know upon this subject. Do you know any other matter or thing which will explain the relations of the above parties and their rights to said bonds or any part thereof? If yea, state the same fully.

35 Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others

against

CHARLES M. FRY, Assignee, and Others.

Redirect interrogatory to be administered on the part of the complainants to Charles Cavaroc and Charles Cavaroc, Jr., witnesses to be examined on the part of the complainants in the action and before the commissioner referred to in the preceding interrogatories and cross-interrogatories.

If, in answer to the fifth interrogatory, you shall state anything in reference to the bills of exchange therein mentioned, please state whether those bills of exchange have been fully paid or not; or, if partially paid, to what extent, so far as you know.

EDGAR A. HUTCHINS,
Complainants' Solicitor.

Depositions of witnesses produced, sworn, and examined the twelfth day of July, eighteen hundred and eighty-one, and other days, as hereinafter specified, at the city of New Orleans, State of Louisiana, under and by virtue of a commission issued out of the circuit court of the United States for the southern district of New York in a certain cause therein depending and at issue, wherein

Frederick Dumont and others are complainants and Charles M. Fry, assignee, and others are defendants, as follows, viz., July 12th, 1881:

E. H. REYNES, of New Orleans, State of Louisiana, an exchange and stock broker, aged fifty-three years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of F. Laborde and E. H. Reynes, as-
36 signees of Charles Cavaroc & Son, does depose and say as follows:

1st. To the first interrogatory he saith: I am fifty-three years of age; an exchange and stock broker, and I reside in New Orleans.

2d. To the second interrogatory he saith: I know Charles Cavaroc and his son, of the firm of Charles Cavaroc & Son, in person, but I have no personal acquaintance with Mr. Schuchardt or his sons, but I knew one of his sons-in-law, Mr. Wells. I had some little business transaction with him in New York, and saw him once or twice in his office on business, but that was prior to the failure of Mr. Cavaroc. I am one of the parties to this suit, coassignee with F. Laborde, whom I also know personally, Mr. Laborde and myself being coassignees of the bankrupt estate of C. Cavaroc & Son. Mr. Laborde resides here in New Orleans also, but he is now in Europe, on account of his health, with his family, and has been in Europe for about one year and very ill. Charles Cavaroc, Senior, resides in New Orleans. His son resides in Chicago, where he has a wine store—Charles Cavaroc, Junior. I know from Charles Cavaroc personally and from the schedule of C. Cavaroc & Son in bankruptcy that the two hundred and thirty-two bonds of the city of New Orleans of the par value of one thousand dollars each were left in the hands of Schuchardt & Sons. I do not know personally why they were deposited with Schuchardt & Sons. Mr. Charles Cavaroc told me that they were deposited with Schuchardt & Sons. I do not know what was said, done, and written in reference to said bonds. I know nothing further than what I have already stated in reference to said bonds. I believe the assignee of the estate of Schuchardt & Sons has possession of those bonds now. I have not had any letters from Schuchardt & Sons relative to said bonds.

37 3d. To the third interrogatory he saith: I do not know anything about that at all. It has never come before me, as assignee, from the bank or the receiver.

4th. To the fourth interrogatory he saith: I do not know any fact showing to whom said bonds belong or who has the right to the whole or any part of the same. I have left the whole of that matter to our legal advisers. I do not know to whom these bonds belong; I do not know who the owners are. From the schedule of C. Cavaroc & Son I can see that these bonds belong on joint account to the estate of C. Cavaroc & Son and F. Dumont & Co. Mr. Cavaroc has drawn drafts to the amount of four hundred and eighty-four thousand (484,000) francs on the house of F. Dumont & Co., which were accepted and paid by them. That I know, as shown by the schedule of C. Cavaroc & Son in bankruptcy. There is a balance of five hundred and fifty-six thousand (556,000) francs of drafts drawn by

C. Cavaroc & Son on F. Dumont & Co. held by different parties; I do not know whether they were accepted by F. Dumont & Co., but they are outstanding and unpaid—I know that from the schedule of C. Cavaroc & Son in bankruptcy—and the owners of these drafts have proven their claims and received their share of the dividends. I know this from being assignee and having paid them. I know that the Louisiana National Bank has made a claim against the assignees of C. Cavaroc & Son on drafts—one of twenty thousand dollars and one of ten thousand dollars—thirty thousand dollars ($30,000) all told—drawn upon Schuchardt & Sons by C. Cavaroc & Son. That is to my personal knowledge. They have proved their claim and received their dividends at the time when the dividends were declared. They received four per cent. once and one per cent. at another time. On the 6th January, 1879, the dividend of
38 four per cent. was paid, amounting to $1,200, and a further dividend was paid February 16th, 1880, amounting to $230. I know nothing else which will explain the relations of the above parties and their respective claims to said bonds.

E. H. REYNES.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 12th day of July, 1881, before—

J. D. ROUSE, *Com'r.*

STATE OF LOUISIANA, *City of New Orleans,* } ss:

I, J. D. Rouse, do hereby certify that E. H. Reynes, the witness, personally appeared before me on the 12th day of July, 1881, at ten o'clock in the forenoon, at my office, No. 3½ Carondelet street, in the city of New Orleans, in the State of Louisiana, and after being duly sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same; and I further certify that I have subscribed my name to each half sheet thereof.

J. D. ROUSE, *Com'r.*

E. D. LE BRETON, of New Orleans, State of Louisiana, a lawyer, aged forty-eight years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of E. H. Reynes and F. Laborde, assignees of C. Cavaroc & Son, and interrogated by T. L. BAYNE, attorney for said assignees, does depose and say as follows:

Q. What is your occupation?
A. I am a lawyer.
Q. Where do you reside?
A. In the city of New Orleans.
39 Q. What is your age?
A. I am forty-eight years of age.
Q. Have you had any relation to the bankrupt estate of C. Cavaroc & Son; and, if so, what relation have you had with this bankrupt estate?

A. Yes; I prepared a schedule of C. Cavaroc & Sons when they went into bankruptcy, and I have since then, more or less, been connected with the estate, making their accounts, and so on, preparing the checks of the assignees. The general administration of the assignees has been in my hands.

Q. Do you know anything about two hundred and thirty-two bonds of the city of New Orleans, of the par value of one thousand dollars each, said to be in the hands of the assignees of F. Schuchardt & Sons? If so, state what you know in reference to them.

A. I know something about them, but not to my personal knowledge.

Q. What knowledge have you, and from what sources do you derive it, in reference to those bonds?

A. From what C. Cavaroc & Son represented to me when I made the schedule. According to their statement, those bonds were placed in the hands of F. Schuchardt & Sons about the year 1873. They belonged to the joint account of C. Cavaroc & Son and F. Dumont & Co. They were purchased by C. Cavaroc & Son for their joint account.

Q. Do you know about what they cost?

A. Yes; according to the statement made by M. Cavaroc, they cost one hundred and eighty-nine thousand three hundred and sixty dollars ($189,360).

Q. How were they paid for—in drafts, or how?

A. They seem to have been paid for by a series of drafts drawn by C. Cavaroc & Son on F. Dumont & Co.—that is, according to the schedule, not from my personal knowledge. Of these drafts four hundred and eighty-four thousand (484,000) francs seem to have been paid by F. Dumont & Co., and the balance of those drafts—about five hundred and fifty-six thousand (556,000) francs—seem to be outstanding and unpaid, and the unpaid balance of those drafts has been proven against the estate of C. Cavaroc & Son by the holders thereof, who have received dividends thereon. That is a matter of my personal knowledge.

Q. Do you know where the correspondence of C. Cavaroc & Son—their letters and letter books—are?

A. No, sir; I do not know.

Q. Do you know whether they have been destroyed by fire?

A. I do not know. The last time when I saw them was in the office of C. Cavaroc & Son, when I was preparing their schedule in bankruptcy.

Q. In the preparation of that schedule did you have full access to their books and papers?

A. Yes.

Q. Do you know whether or not the New Orleans National Banking Association or their receiver has ever made any claim upon those bonds?

A. I could not say; I do not know. I know of no claim made by either of them.

Q. Do you know anything of any claim by the Louisiana National Bank arising from drafts drawn by C. Cavaroc & Son on F.

Schuchardt & Sons; and, if so, what do you know and what drafts were drawn?

A. Yes. The Louisiana National Bank of New Orleans made a claim on two drafts, one of ten thousand dollars ($10,000) and the other of twenty thousand dollars ($20,000). Those drafts were dated, one October 18th, 1873, and the other October 12th, 1873. They proved their claims on those two drafts and received dividends thereon from the estate of C. Cavaroc & Son.

Q. How many dividends have been declared in the bankruptcy of C. Cavaroc & Son?

A. Two dividends have been declared in that case, one of four per cent. and one of one per cent. The proofs were made prior
41 to the 6th of August, 1877; how long before I cannot say. The first dividend was declared on the 6th of August, 1877, and the second dividend on the 21st of January, 1880. They have collected both dividends.

Q. Where is Mr. F. Laborde?

A. He is in Bordeaux, France, and has been there fully a year.

Q. Is he in bad health?

A. Yes. He was sick when he left here.

E. D. LE BRETON.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 12th day of July, 1881, before—

J. D. ROUSE,
Commissioner.

STATE OF LOUISIANA, }
City of New Orleans, } *ss:*

I, J. D. Rouse, do hereby certify that E. D. Le Breton, the witness, personally appeared before me on the 12th day of July, 1881, at 12 o'clock meridian, at my office No. 3½ Carondelet street, in the city of New Orleans, State of Louisiana, and, after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same; and I further certify that Thomas L. Bayne, Esq., appeared in behalf of said defendants, Reynes and La Borde, assignees, and no counsel appeared for any other party; and I further certify that I have subscribed my name to each half — of said deposition.

J. D. ROUSE,
Commissioner.

CHARLES CAVAROC, SR., of the parish of St. Bernard and State of Louisiana, merchant, aged fifty-three years, a witness on behalf of complainants, being duly and publicly sworn pursuant to the directions hereto annexed, doth depose and say as follows:

42 To the first interrogatory he saith: My name is Charles Cavaroc, Sr.; 53 years old; merchant. I reside in the parish of St. Bernard, State of Louisiana.

To the second interrogatory he saith: I know the complainants, F. Dumont & Co. I know F. Schuchardt & Sons, but I am not acquainted with Mr. Fry. I have known Mr. Dumont since twenty-five or thirty years, and Schuchardt & Sons since about twenty years.

To the third interrogatory he saith: I was the senior member of the firm of C. Cavaroc & Son during those years referred to, which firm was engaged in the commission business and banking business. The business of the firm was carried on in the city of New Orleans, State of Louisiana, and was composed of myself and my son, C. Cavaroc, Jr. During the same time I was president of the New Orleans National Banking Association and the New Orleans Mutual Insurance Association.

To the fourth interrogatory he saith: I did deposit with the firm of F. Schuchardt & Sons, of the city of New York, (232) two hundred and thirty-two bonds of the city of New Orleans, of the par value of ($1,000) one thousand dollars each, some time in the year 1870, by myself, C. Cavaroc. It was for safe keeping. They were deposited for account of my firm, and that deposit had no connection whatever with the bank. I couldn't remember the conversations that I had at the time that I deposited the bonds. I know at that time I didn't owe a cent to Mr. Schuchardt. I trusted him simply with the bonds without any idea of borrowing money on them. I am unable to produce any of the original correspondence between Schuchardt & Sons and myself in reference to these bonds. Some of them were burned in my store about four years ago, and others I delivered to Mr. Fergus Fusillier, my former attorney, who is now dead. My impression is that some of these letters
43 have been sent to New York to Mr. Monrose or to Mr. Hutchings. I have copies of a few letters and extracts from letters written by my firm or myself to Schuchardt & Sons, and a few copies and extracts of a few letters received from Schuchardt & Sons, with the dates of same, which I will produce and annex to my answer, which copies I now annex as part of my answers, marked "A 1," "A 2," "A 3," "A 4," "A 5," "A 6," "A 7," "A 8," and "A 9." I have no other copies of correspondence with Schuchardt & Sons, my letter books, as previously stated, having been burned. I don't remember that they gave me any receipt or memorandum of the bonds, but they were always subject to my call.

To the fifth interrogatory he saith: I was president of the New Orleans National Banking Association, located at New Orleans, Louisiana. When Mr. Schuchardt asked from the bank a guarantee for a credit of one hundred thousand dollars ($100,000), to be made by Schuchardt against exchange which the bank had to send him to cover those one hundred thousand dollars, I individually and I as a member of the firm of C. Cavaroc & Son gave to Mr. Schuchardt the authority to take a certain amount of those two hundred and thirty-two bonds to cover his credit of one hundred thousand dollars, until the bank had sent to him the amount of the exchange to make good those one hundred thousand dollars. This was the whole transaction. I don't know if I have explained myself well. I can

produce no other letters in reference to the matter except such copies or extracts as are referred to in my previous answer.

To the sixth interrogatory he saith: The copies of the letters which I have annexed to my deposition were made by one of my clerks under my direction.

To the seventh interrogatory he saith: I am familiar with the banking and brokerage business in the city of New Orleans
44 but not in New York. I have been familiar with the business in New Orleans for twenty-five years.

To the eighth interrogatory he saith: There is a usage and meaning. The words "*à découvert*" we use more frequently in French than "credit." If I write in French to ask an open credit to a banker I will merely ask him: "Let me draw on you *à découvert* for one or two hundred thousand dollars." If I say to the banker, "I will cover you with exchange to that amount," as soon as I cover to that amount it is finished. I don't owe a cent to that amount, *à découvert* is closed, and I have a right to go on again. It is a revolving credit. For instance, with Schuchardt suppose I draw to-day $100,000 on Schuchardt and it was *à découvert*, and the next morning or day after I send to Schuchardt $100,000 of exchange bought from different houses here, my *à découvert* is finished—it is closed. As soon as I have remitted exchange for the $100,000 draft of the day preceding the *à découvert* is closed. Schuchardt is covered then. On the same day or next morning I have a right to draw $100,000 and cover again. As soon as I have remitted $100,000 exchange I have a right to draw again. Therefore, when the bank remitted exchange to cover what the bank had drawn under that credit, *à découvert*, the guarantee made by me, C. Cavaroc, ceased, and the right to hold these bonds ceased under that guarantee.

To the 9th interrogatory he saith: The New Orleans National Banking Association suspended payment on the 4th of October, 1873. The bank did owe to Schuchardt & Sons a few thousand dollars, according to their account current, on the 1st of October, but as the bank only failed on the 4th of October and had remitted during those three days I have no doubt that the balance was a trifling one and may be against Schuchardt & Son. The bank might have become subsequently liable on drafts or endorser of exchange, which was afterwards protested. I am positive, though, that the
45 credit *à découvert* for the $100,000 was covered entirely by the remittance of drafts. There had been an account, but that account of *à découvert* at that time was closd. It existed no more because there was no indebtedness under it. I know nothing about debts opened since.

To the 10th interrogatory he saith: The firm of C. Cavaroc & Son failed in 1873, on the 4th day of October, the same day that the bank failed. On the account current rendered by Schuchardt & Sons, representing a balance of $7,454.22 against my firm, this balance they arrived at by first crediting my firm with the proceeds of certain drafts forwarded on two occasions for 100,000 francs each time, and afterwards debiting them January 5th, 1874, for protested drafts on Dumont & Co., $29,938.62; January 12th, 1874, protested drafts

on same, $22,026.23, and unpaid drafts on Mascullier Fils, $6,562.23, which drafts it seems were in the possession of Schuchardt & Sons. In that account current Schuchardt & Sons omitted to credit my firm with $8,120 interest coupons on 232 bonds which fell due December 1st, 1873. This credit would destroy the balance struck and leave Schuchardt & Sons debtors instead of creditors of my firm, the account current being in other respects correct. I have paid them nothing since, and I don't know whether or not any payment has been made to them upon any account by assignees in bankruptcy. My firm nor my legal representatives do not owe Schuchardt & Sons anything on any account. It may be that they are the holders of protested drafts upon which my firm were drawers or indorsers.

To the 11th interrogatory he saith: The bonds were bought by C. Cavaroc & Son, in partnership with F. Dumont & Co., of Havre, France. The agreement was that C. Cavaroc & Son should buy them on joint account with F. Dumont & Co. Caravoc & Son drew on F. Dumont & Co. for the payment of those bonds—that is, the whole amount. The purchase was made by my son, the
46 junior member of the firm, and may have been of other securities which were subsequently exchanged for the bonds. These bonds, when they purchased in 1870 upon joint account, were paid for out of the proceeds of drafts drawn by my firm upon F. Dumont & Co. to the extent of one million of francs, but as these drafts matured they were covered by remittances of exchange made by my firm, and other drafts were drawn, and so continued until after my failure, after which time F. Dumont & Co. paid drafts so drawn to the amount of 484,000 francs, which is all that they paid upon account of the purchase-money of these bonds; and the balance of these drafts are held by various creditors, except 200,000 francs paid by us or charged to Cavaroc & Son in the account of Schuchardt & Sons ("Exhibit B"), and who have proved them up in bankruptcy against C. Cavaroc & Son.

Cross-Interrogatories Propounded to the Witness on Behalf of Charles M. Fry, one of the Defendants.

To the 1st cross-interrogatory he saith: I don't know that I had any conversations inquired of in the 4th interrogatory, and therefore cannot state what took place, if any did take place.

To the 2d cross-interrogatory he saith: I was president of the New Orleans National Banking Association from its conversion from a State bank to the National Banking Association until its failure, Oct. 4th, 1873. I was president in the month of September, 1873. I did take great personal interest in the affairs of that bank. I did aid it with funds of my own and other resources obtained from friends. I think I put in the bank from $200,000 to $300,000 of good assets. I had to help the bank. I did preside at the meeting referred to in the interrogatory. Such resolution was passed, and, as far as I can remember, it is substantially the resolution passed at that meeting. I did not vote for the resolution because I presided

at the meeting. I cannot annex the original resolution because it is not in my possession or under my control.

47 To the 3d cross-interrogatory he saith: I do not remember that I ever pledged those bonds except for that credit *à découvert*. I never authorized Schuchardt & Sons to dispose of or borrow any money on those bonds. I never authorized Schuchardt & Sons to hypothecate or use said bonds other than for the purpose already stated by me in my direct answer.

To the 4th cross-interrogatory he saith: The agreement was made by myself with Mr. Dumont in Paris. It was verbal and I sent a cable to my son to buy for a million francs. I think that was in the month of June or July, 1870. I have already stated, in answer to the 11th direct interrogatory, the manner in which payments for these bonds were made. I cannot state more in detail than I have already stated in answer to the 11th interrogatory how such payments were made by drawing and redrawing upon F. Dumont & Co. The drafts which were thus drawn were wholly outstanding at the time of our failure, but subsequently Dumont & Co. paid 484,000 francs. I cannot give other details called for by this cross-interrogatory than I have already given in my answers to the direct interrogatories herein, and I refer to the same as my answer hereto.

To the 5th cross-interrogatory he saith: The complainants in this case are F. Dumont & Co., against whom certain bills of exchange were drawn by us in September. I cannot now recall the particulars of the bills described in this interrogatory. I am not in possession of my books and I cannot ascertain. I couldn't tell the origin or consideration of the bills referred to, but as heretofore stated certain bills were drawn, the consideration of which were to pay for the bonds. I drew a great many bills other than that, but I cannot give the details or their origin. I was buying large amounts of cotton for them and drew a great many bills for a very large sum, which I cannot specify, during a long period of time, such drawings covering several millions of francs.

48 To the 6th cross-interrogatory he saith: I cannot say anything further. I have stated all that I know or that I can now recall.

Interrogatories Propounded on Behalf of Laborde & Reynes' Assignees.

To the 1st interrogatory he saith: My age is 53; occupation, merchant; I reside in the parish of St. Bernard, near the city of New Orleans, State of Louisiana.

To the 2d interrogatory he saith: I know F. Dumont & Co. and have known them for 25 years. I know the assignees of the bankrupt estate of C. Cavaroc & Son. They were F. Laborde and E. H. Reynes. F. Laborde is dead. E. H. Reynes is still assignee. (275) two hundred and seventy-five bonds in number were deposited with Schuchardt & Sons some time in the year 1870 by C. Cavaroc. On the 4th of December, 1871, F. Schuchardt & Sons addressed to the cashier of the New Orleans National Banking Association a letter in which, after acknowledging that they held no security

from the bank, these gentlemen said: "In order to evince our desire of doing all in our power to contribute to the development of our correspondence, we hereby authorize you to draw upon us in advance of remittance to the extent of one hundred thousand dollars, with the understanding that such drafts are to represent exchange actually bought and paid for." On the 6th February, 1873, the cashier of the New Orleans National Banking Association addressed to Schuchardt & Sons a letter which contained the following paragraph: "Are we still authorized to draw *à découvert* $100,000 against purchase of exchange advised by wire?" To this letter Schuchardt & Sons, on the 11th of February, 1873, replied by another letter, in which is found the following paragraph: "The credit of $100,000 *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the
49 agreement cancelled." The several letters or extracts of letters relating to this subject, which I have in my possession, are attached to my answers to the direct interrogatories by the complainants in this case and I refer to them as part of my answer here.

To the third interrogatory he saith: I know nothing upon the subject inquired about. I know of no claim made by the receiver or the New Orleans Banking Association.

To the fourth interrogatory he saith: In answer to this interrogatory I refer to the answers heretofore made to the direct and cross-interrogatories herein. I mean by joint account in the purchase of the bonds between Dumont & Co. & Cavaroc & Son that both houses had the same interest, were equal owners of the bonds, and it appears from the account rendered by Dumont & Co. that they paid 484,000 francs on account of the purchase of the bonds. Cavaroc & Son paid (200,000) two hundred thousand francs of drafts, and those 200,000 francs are the same charged to us by F. Schuchardt & Sons, and were drawn against those very same bonds, and they are the 200,000 francs mentioned in the account hereto annexed and marked "Exhibit B."

At the time Schuchardt claimed fifty of these bonds to secure the indebtedness of my firm it was not correct, because, according to his own statement and the facts stated by me heretofore, we owed nothing to Schuchardt & Sons, and for the one hundred and eighty-two bonds which Schuchardt kept to secure the debt of the bank they had no right to hold those bonds, according to the reasons I gave heretofore in my deposition.

I don't know whether or not the Louisiana National Bank has made any claims against the assignees of Cavaroc & Son or received any dividends from them on any drafts drawn on F. Schuchardt & Sons.

I have said all I know about matters in relation to the above bonds and parties herein inquired of.

50 *Redirect Interrogatories on the Part of Complainants.*

To the first redirect interrogatory he saith: I don't know whether these particular bills were paid, except those 200,000 francs charged

to our account by F. Schuchardt & Sons, as per "Exhibit B," and the 484,000 francs paid by Dumont & Co., which I have stated already.

I desire to say, in explanation of the "*à découvert*" spoken of in my testimony, that it had no relation to guarantee and to payment of the exchange remitted by the bank nor of the solvency of the drawers or endorsers or acceptors, but merely embraced remittance of exchange by the bank.

This is the signification of the words "*à découvert*" here and in France, and in the letters sent and received by me, extracts of which are annexed, the words are so understood.

C. CAVAROC.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 4th day of Nov., 1881, before—

J. D. ROUSE,
Commissioner.

51 STATE OF LOUISIANA, *City of New Orleans,* } *ss:*

I, J. D. Rouse, do certify that Charles Cavaroc, Senior, the witness, personally appeared before me on the 4th day November, 1881, at two o'clock in the afternoon, at my office, No. 3½ Carondelet street, in the city of New Orleans, State of Louisiana, and, after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing depositions, and did in my presence subscribe the same and indorsed the exhibits annexed thereto; and I further certify that I have subscribed my name to each half sheet thereof and to each exhibit.

J. D. ROUSE, *Com's'r.*

A 1.

NEW YORK, *December 4th,* 1871.

To the cashier of the N. O. Nat'l Bank'g Asso'n, New Orleans:

However, in order to evince our desire of doing all in our power to contribute to the development of our correspondence, we hereby authorize you to draw upon us, in advance of remittances, to the extent of $100,000 (one hundred thousand dollars), with the understanding that such drafts are to represent exchange actually bought and paid for. * * *

We presume also that when the loan of the Trust Co., which falls due on the 21st inst., will be paid the securites will be replaced in our possession.

(Signed) F. SCHUCHARDT & SONS.

Exhibit A 1 annexed to deposition of Charles Cavaroc, Sen., Nov. 4, 1881.

C. CAVAROC.

J. D. ROUSE, *Com'r.*

52 A 2.

NEW ORLEANS, *February 6th*, 1873.

Mess. F. Schuchardt & Sons, New York:

Are we still authorized to draw *a decouvert* $100,000 (one hundred thousand dollars) against purchases of exchange advised by wire?

(Signed) H. T. BLACHE, *Cashier.*

Exhibit A 2 annexed to deposition of Charles Cavaroc, Sen., Nov. 4, 1881.

C. CAVAROC.

J. D. ROUSE, *Com's'r.*

A 3.

NEW YORK, *February 11th*, 1873.

To Henry Blache, Esq., cashier of the N. O. Nat'l Bank'g Ass'c'n, New Orleans:

The credit of $100,000 (one hundred thousand dollars) *a decouvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, suppose the agreement cancelled.

(Signed) F. SCHUCHARDT & SONS.

Exhibit A 3 annexed to deposition of Charles Cavaroc, Sen., Nov. 4, 1881.

C. CAVAROC.

J. D. ROUSE, *Com's'r.*

53 A 4.

NEW ORLEANS, *February 15th*, 1873.

Messrs. Schuchardt & Sons, New York:

Your letter of December 4th, 1871, authorized us to draw, in advance of remittance, to the extent of $100,000 (one hundred thousand dollars), represented by purchases of exchange advised by telegraph. There was no mention of a deposit of city bonds to guarantee such overdraft, and we have been acting ever since under the impression that the credit was still in force. We now note that it is cancelled, and beg leave to refer you to the private letter of the president on the subject.

(Signed) H. T. BLACHE, *Cashier.*

Exhibit A 4 annexed to deposition of Charles Cavaroc, Sen., Nov. 4, 1881.

C. CAVAROC.

J. D. ROUSE, *Com'r.*

A 5.

NEW ORLEANS, *February 15th*, 1873.

Mess. Schuchardt & Sons, New York:

In your letter of the 11th instant you say: "The credit of $100,000

(one hundred thousand dollars), *a decouvert*, was predicated upon the deposit of New Orleans city bonds, and on their withdrawal
54 we, of course, supposed the agreement cancelled." You know that exchange at New Orleans is purchased by making advances until such time as the drafts are delivered, and it was with view of making our mutual transactions more active that we asked this credit, "*a decouvert*," at the time. In view of your remark I have nothing to say, except to authorize you to consider a portion of the bonds belonging to my firm, which you have in your possession, as collateral security in case you should not be covered (*en cas de decouvert*).

(Signed) C. CAVAROC, *Pres't.*

Exhibit A 5 annexed to deposition of Charles Cavaroc, Sen., Nov. 4th, 1881.

C. CAVAROC.

J. D. ROUSE, *Com's'r.*

A 6.

NEW YORK, *February 27th*, 1873.

To the cashier of the New Orleans Banking Association, New Orleans:

In reply to your worthy president's letter of the 15th inst. we take pleasure in authorizing you, in accordance with the terms therein stated, to value on us, "*a decouvert*," for a sum not exceeding as maximum $100,000 (one hundred thousand dollars), against exchange purchases.

(Signed) F. SCHUCHARDT & SONS.

Exhibit A 6 annexed to deposition of Charles Cavaroc, Sen., Nov. 4, 1881.

C. CAVAROC.

J. D. ROUSE, *Com's'r.*

55 A 7.

NEW ORLEANS, *October 9th*, 1873.

F. Schuchardt & Sons, New York:

Please deliver to L. Monrose two hundred and thirty bonds, one thousand dollars each, city of New Orleans seven per cent., held in trust for us.

(Signed) C. CAVAROC & SON.

Exhibit A. 7 annexed to deposition of Charles Cavaroc, Sen., Nov. 4, 1881.

C. CAVAROC.

J. D. ROUSE, *Com's'r.*

A 8.

NEW YORK, *October 9th*, 1873.

C. Cavaroc & Sons, New Orleans:

Schuchardt refuses delivering; says you pledged as security for bank.

(Signed) L. MONROSE.

Exhibit A. 8 annexed to deposition of Charles Cavaroc, Sen., Nov. 4, 1881..

C. CAVAROC.

J. D. ROUSE, *Com's'r.*

56 A 9.

NEW YORK, *October 9th*, 1873.

C. Cavaroc & Son, New Orleans:

According to your written authority we hold New Orleans city bonds as collateral security against Bank of New Orleans. We insist on you delivering to Reynes the bills receivable held by you in trust. Answer; also reply about bill lading per Queenstown.

(Signed) F. SCHUCHARDT & SONS.

Exhibit A 9 annexed to the deposition of Charles Cavaroc, Sen., November 4, 1881.

C. CAVAROC.

J. D. ROUSE, *Commissioner.*

(See Table, marked p. 57.)

58 N. W. CASEY, of the city of New Orleans and State of Louisiana, aged fifty-five years, receiver, a witness on behalf of F. Laborde and E. H. Reynes, assignees of C. Cavaroc & Son, being duly and publicly sworn pursuant to the directions hereto annexed, doth depose and say as follows:

To the first interrogatory he saith: My name is N. W. Casey. I am 55 years of age; occupation, receiver of the New Orleans National Banking Association. I reside in New Orleans, Louisiana.

To the second interrogatory he saith: I don't know either F. Dumont & Co. or Charles M. Fry. I know the assignees of C. Cavaroc & Son. They are E. H. Reynes and F. Laborde. They reside in New Orleans. I am informed that Mr. Laborde is dead. I don't know anything about the bonds inquired of in this interrogatory. I have received no letters from Schuchardt & Sons relative to those bonds.

To the third interrogatory he saith: I have never made any claim as receiver to said bonds, nor has the New Orleans National Banking Association, nor has any such claim been made by any person representing said bank, so far as I know.

To the fourth interrogatory he saith: I do not know any fact showing to whom said bonds referred to in this interrogatory belong nor who has a right to the same or any part of the same. I do not know whether the Louisiana National Bank has made any claim against the assignees of C. Cavaroc & Son or received any dividends from them on any drafts alleged to have been drawn by Schuchardt & Sons. I know they had claims, but whether they have presented them to the assignees or the particulars I don't know. I know they were creditors against the estate of C. Cavaroc & Son, but what the nature of those claims were I don't know. Charles M. Fry, assignee or trustee of Schuchardt & Sons, made claims against the
59 New Orleans National Banking Association which have been adjusted and allowed for the sum of (195,315.63) one hundred and ninety-five thousand three hundred and fifteen $\frac{63}{100}$ as a claim against said association, upon which dividends have been paid to said Fry in his said capacity to the amount of fifty-five per cent., and there will be a further small dividend when the assets are all realized.

Schuchardt & Sons, or rather Fry, the assignee of Schuchardt & Sons, pretended to be entitled to hold or recover for their account certain funds in the hands of the Union Bank of London belonging to the New Orleans National Banking Association, amounting to about ($38,000) thirty-eight thousand dollars, and to other funds in the hands of Dutfoy & Co., of Paris, France, amounting to about forty thousand francs, which were the subject of litigation in this suit and were awarded to me as the receiver of the New Orleans National Banking Association by a decree upon my cross-bill herein, the particulars of which will appear by reference to said proceedings. At the time of the failure of the bank, of which I am receiver, certain assets belonging to the bank were in the hands of parties claiming to hold them as collateral security for the indorsement of certain bills of exchange which had been negotiated through Schuchardt & Sons, said bills being drawn by the bank upon Sigournet Freres, of Bordeaux, France. Suit was brought for the recovery of these assets, which resulted in my favor, as will appear by the decision of the Supreme Court of the United States in the case of Casey, receiver, *vs.* F. Schuchardt and others, reported in 6 Otto, page 494.

After the termination of all the litigation aforesaid the claims of Mr. Fry, as assignee of Schuchardt & Sons, against the New Orleans National Banking Association were adjusted and allowed in
60 the sum above stated as a general creditor of said association, and upon which dividends have been paid as aforesaid.

N. W. CASEY.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 8th day of November, 1881, before—

J. D. ROUSE,
Commissioner.

STATE OF LOUISIANA, }
City of New Orleans, } ss:

I, J. D. Rouse, do certify that N. W. Casey, the witness, personally appeared before me on the 8th day of November, 1881, at ten o'clock a. m., at my office, in the city of New Orleans, State of Louisiana, and, after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition and did in my presence subscribe the same; and I further certify that I have subscribed my name to each half sheet thereof.

J. D. ROUSE,
Commissioner.

And I further certify that Charles Cavaroc, Jr., who is named in said commission, does not reside in the State of Louisiana, and that I have been unable to take his deposition herein.

J. D. ROUSE,
Commissioner.

61 United States Circuit Court.

FREDERICK DUMONT *et al.*
against
CHARLES M. FRY, Trustee, *et al.*

We hereby stipulate to admit at the trial of this cause the extracts hereto annexed from letters and telegrams numbered, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, duly and legally taken and properly and legally proved, as so much of the correspondence of the said parties of the dates mentioned; and, further, that any of the parties to this action be at liberty on the argument to read the whole of any of such originals.

Dated New York, Dec. 2, 1881.

PLATT & BOWERS,
Solicitors for Charles M. Fry, Trustee, &c.

MAN & PARSONS,
Solicitors — Laborde et al., Assignees.

EDGAR A. HUTCHINS,
Complainants' Solicitor.

No. 1.

NEW YORK, *Dec. 4th*, 1871.

N. Augustine, Esq., cashier New Orleans Banking Association, New Orleans, La.

DEAR SIR: In reply to your enquiry about drawing in advance against purchases of exchange we beg to say that we granted that facility at a time when your foreign exchange business with us was much more extensive and consequently more remunerative than at

present, and when we held as security a deposit of N. O. city
62 bonds. We were, moreover, induced to make these advances (although, as we explained at the time, we could make a much more lucrative use of the money by using it here) on the assurance of Mr. Cavaroc that you would only temporarily require such facilities, and that your business would increase to such an extent that the future would largely compensate us for any present sacrifices. To our regret, however, such has not been the case, and your business, instead of increasing, has greatly diminished. However, in order to evince our desire of doing all in our power to contribute to the development of our correspondence, we hereby authorize you to draw upon us in advance of remittances to the extent of $100,000 (one hundred thousand dollars), with the understanding that such drafts are to represent exchange bought and paid for. * * * We presume also that when the loan of the Trust Co., which falls due on the 21st inst., will be paid the securities will be replaced in our possession.

No. 2.

NEW ORLEANS, *Feb'y* 6, 1873.

Mess. F. Schuchardt & Sons, New York:

Are we still authorized to draw, *à découvert*, $100,000 (one hundred thousand dollars) against purchases of exchange advised by wire?

(Signed) H. T. BLACHE, *Cashier.*

No. 3.

NEW YORK, *Feb'y* 11, 1873.

Henry Blache, Esq., cashier of the N. O. National Banking Association, New Orleans:

The credit of $100,000 (one hundred thousand dollars) *à*
63 *découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled.

(Signed) F. SCHUCHARDT & SONS.

No. 4.

NEW ORLEANS, *Feb.* 15, 1873.

Messrs. Schuchardt & Sons, New York:

Your letter of December 4, 1871, authorized us to draw in advance of remittance to the extent of $100,000 (one hundred thousand dollars), represented by purchases of exchange advised by telegraph. There was no mention of a deposit of city bonds to guarantee such overdraft, and we have been acting ever since under the impression that the credit was still in force. We now note that it is cancelled and beg leave to refer you to the private letter of the president on the subject.

(Signed) H. T. BLACHE, *Cashier.*

No. 5.

NEW YORK, *Feb.* 27, 1873.

To the cashier of the New Orleans Banking Association, New Orleans:

In reply to your worthy president's letter of the 15th inst. we take pleasure in authorizing you, in accordance with the terms therein stated, to value on us "*à découvert*" for a sum not exceeding as maximum $100,000 (one hundred thousand dollars), against exchange purchases.

(Signed) F. SCHUCHARDT & SONS.

64 No. 6.

A, for identification, Dec. 3, 1881.

NEW YORK, *Sept.* 19, 1873.

MY DEAR MR. CAVAROC: I have sufficiently explained to you on your last visit here that we should prefer receiving from the bank only such paper as it should have purchased, and after mature consideration and consultation with Mr. Schuchardt, who has returned some days since, we have determined to request the bank to limit its exchange business with us to the forwarding of such drafts made by third parties as it shall deem proper to purchase, and we beg you so to inform the bank. * * *

We hope that the bank shall give great activity to its operations on the above basis, and in order to assist it as much as possible we still authorize it to draw against purchases of exchange, and in advance of the remittances, to the amount of $100,000 on the conditions specified in the letter of Mr. Cavaroc of 15th February last.

Believe me, my dear sir and friend, yours most devotedly,

(Signed) LAWRENCE WELLS.

Money was loaned until to-morrow @ 1½ %, and you will readily understand that it is no fun to be out of money as we are now. The system which I propose to you above will in a measure remedy this, because we can draw as soon as we shall receive your telegram advising purchases.

No. 7.

NEW ORLEANS, *Oct.* 9, 1873.

F. Schuchardt & Sons, New York:

Please deliver to L. Monrose two hundred and thirty bonds, one thousand dollars each, city of New York 7 per cent., held in trust for us.

(Signed) C. CAVAROC & SON.

65 No. 8.

NEW YORK, *Oct.* 9, 1873.

C. Cavaroc & Son, New Orleans:

Schuchardt refuses delivering; says you pledged as security for bank.

(Signed) L. MONROSE.

No. 9.

NEW YORK, *Oct. 9th*, 1873.

C. Cavaroc & Son, New Orleans:

According to your written authority we hold New Orleans city bonds as collateral security against Bank of New Orleans. We insist on your delivering to Reynes the bills receivable held by you in trust. Answer; also reply about bill lading per Queenstown.

(Signed) F. SCHUCHARDT & SONS.

No. 10.

(Translation.)

NEW ORLEANS, *Oct.* 11, 1873.

Mess. F. Schuchardt & Sons, New York.

GENTLEMEN: "According to your written authority we hold New Orleans city bonds as collateral security against Bank of New Orleans."

By this phrase you seem to imply that our 232 bonds ought to serve as a guarantee to you for the reimbursement of all kinds of debts and of all sums due by the bank.

In response we refer you to the letter of our senior partner, C. Cavaroc, February 15th last, which you yourselves invoke as the authority on which you base your rights ("according to your written authority").

66 Our authority is contained in the following terms:

"In your letter of the 11th inst. you say: 'The credit of $100,000 *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we of course supposed the agreement cancelled.'

"You know that exchange at New Orleans is purchased by making advances until such time as the drafts are delivered, and it was with a view of making our mutual transactions more active that we asked this credit *à découvert* at the time.

"In view of your remark, I have nothing to say except to authorize you to consider a portion of the bonds belonging to my firm, which you have in your possession, as collateral security in case you should not be covered."

You see that according to the authority which you invoke you have no right to cover yourself by means of these bonds, except for those uncovered sums for which you might not have received the

paper against which they were drawn at the moment of the demand for the restitution of the bonds.

According to the books of the bank, which correspond within a few cents with the account current rendered by you under date of Oct. 1st, it appears that all the drafts which the bank has made on you up to this day have been properly covered, and that is all we guaranteed by the deposit of our bonds.

These bonds are, then, at this moment released, and we renew the order that you deliver them to L. Monrose, who is requested to receive them.

Yours, &c.,

(S'gned) C. CAVAROC & SON.

67 Circuit Court of the United States for the Southern District of New York.

FREDERICK DUMONT & *al. vs.* CHARLES M. FRY & *al.*

Interrogatories to be propounded to Charles Cavaroc, Jr., a witness to be produced, sworn, and examined, under and by virtue of the annexed commission, in Chicago, Illinois, in a certain cause pending in the circuit court of the United States for the southern district of New York, wherein Frederick Dumont and others are plaintiffs and Charles M. Fry, assignee, and others are defendants, on the part of F. Laborde and Edward Reynes, assignees of Charles Cavaroc and Sons.

1st. What is your name, age, place of residence, and occupation?

2d. Do you know the parties to this suit; if not, do you know any or either; and, if so, which of them? How long have you been acquainted with either of the parties as to whom you shall testify that you know him?

3rd. In the summer of 1873 where did you do business, if anywhere, and of what firm, if any, were you a member? Who composed any such firm and in what business was any such firm engaged at that time?

4th. Are you acquainted or have you ever been acquainted with either—and, if so, which—member of the firm of F. Schuchardt & Sons? If you shall say that you have ever been acquainted with either or any of the members of that firm, state when and for what length of time you were acquainted with them.

68 5th. Was there business between any firm of which you were a member and the firm of F. Schuchardt & Sons; if so, for what length of time was there such business prior to the summer of 1873? How was such business carried on? If by correspondence, were you familiar with the correspondence at the time?

6th. Did you visit the city of New York in the summer of 1873; if so, did you while there have interviews with Mr. Lawrence Wells, of the firm of F. Schuchardt & Sons?

7th. Did you at the time know of the correspondence that had taken place between your firm or either member of it and the firm

of F. Schuchardt & Sons or either member of that firm in reference to 232 bonds of the city of New Orleans involved in this suit?

8th. If you were in the city of New York in the summer of 1873 state, as nearly as you can, when, if at all, you returned to the city of New Orleans. Before your departure did you receive a written memorandum from Mr. Lawrence Wells? If so, state whether the paper annexed hereto is a copy or a translation.

9th. Was any arrangement ever made between you and Mr. Wells or by you with the firm of F. Schuchardt & Sons or either member of that firm in reference to the said 232 bonds, except that which appears in the correspondence between F. Schuchardt & Sons and your firm or either member of it and the memorandum previously referred to? Did you ever make any verbal arrangement with Mr. Wells in reference to the said bonds other than that shown by the memorandum previously mentioned? Did you ever make any arrangement with Mr. Wells to the effect that those 232 bonds were to be held by Schuchardt & Sons as general security against any indebtedness which might arise of the New Orleans National Banking Association to them? If, while you were in the city of New York, in the summer of 1873, there were conversations
69 between Mr. Wells and yourself about the 232 bonds of the city of New Orleans, state what, if anything, was said by you to Mr. Wells upon the subject.

Last. Do you know any matter or thing relating to the issues involved in this suit, and which will be of benefit to the defendants, F. Laborde and E. H. Reynes, assignees of Charles Cavaroc & Sons, to which you have not previously testified? If so, state the same as fully and particularly as if you had been specially interrogated in reference thereto.

MAN & PARSONS,
Solicitors — D'f'ts Laborde & Reynes, Assignees of Cavaroc.

The above interrogatories are hereby settled by consent, subject to all legal objections except as to form.

EDGAR A. HUTCHINS,
Complainants' Solicitor.
PLATT & BOWERS,
Solicitors — Defendant Fry, Trustee.

Cross-interrogatories on the part of the defendant, Charles M. Fry, trustee, to be propounded to Charles Cavaroc, Junior, a witness to be produced, sworn, and examined on the part of the defendants, F. Laborde and Edward Reynes, under the annexed commission, in a certain action pending in the circuit court of the United States for the southern district of New York, wherein Frederick Dumont *et al.* are plaintiffs and Charles M. Fry and others are defendants.

First cross-interrogatory. Were your communications with Mr. Wells in French or English? Did not Mr. Wells converse with you in French? Did he not write in French to your firm? Was not the memorandum you are asked about written in French?

Second cross-interrogatory. Do you mean to say that you knew of the correspondence between your firm and F. Schuchardt & Sons which took place while you were away? If so, state how
70 many and what letters composed that correspondence and when, where, and how you read them.

PLATT & BOWERS,
Solicitors for Defendant, Charles M. Fry, Trustee.

Above cross-interrogatory settled by consent, subject to all legal objections except as to form.

EDGAR A. HUTCHINS,
Complainants' Solicitor.
MAN & PARSONS.
Solicitors — Defendants Laborde and Others, Assignees, &c.

Deposition of a witness produced, sworn, and examined the thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-two, at the city of Chicago, in the county of Cook and State of Illinois, under and by virtue of a commission issued out of the circuit court of the United States for the southern district of New York in a certain cause therein depending and at issue, wherein Frederick Durmont and others are complainants and Charles M. Fry and others are defendants, as follows:

CHARLES CAVAROC, JR., a resident of the city of Chicago, county of Cook, and State of Illinois, a merchant, aged thirty-two years and upwards, being duly sworn pursuant to the directions hereto annexed, and examined on the part of F. Laborde and Edward Reynes, assignees of Charles Cavaroc & Son, doth depose and say as follows:

First. To the first interrogatory he saith: My name is Charles Cavaroc, Jr.; age, 32 years; place of residence, Chicago, Illinois; occupation, merchant.

Second. To the second interrogatory he saith: I have known Frederick Durmont personally since 1871, and possibly I know all of the complainants, but I do not know who the others are. I do not know Charles M. Fry, but I have known F. Laborde and Edward Reynes for over twenty years.

71 Third. To the third interrogatory he saith: I did business at New Orleans in the summer of 1873. I was a member of the firm of C. Cavaroc & Son. The firm was composed of C. Cavaroc, Sr., and C. Cavaroc, Jr. We were importing French wines, etc., and doing a general export, commission, and banking business.

Fourth. To the fourth interrogatory he saith: I became acquainted personally with Mr. Frederick Schuchardt and Mr. Lawrence Wells, of the firm of F. Schuchardt & Sons, in the latter part of 1870. I cannot remember the exact month, but it was after September. My firm had been doing business with them before that time, and I was in constant correspondence with them.

Fifth. To the fifth interrogtory he saith: There was business between our firm and the firm of F. Schuchardt & Sons for several years

prior to 1873. The business was all done by correspondence and telegraph, with which I was familiar, having managed the business before being a partner, and after, for I only became a partner with my father on the first of January, 1871, the firm name having been C. Cavaroc before that.

Sixth. To the sixth interrogatory he saith: I did visit New York in the summer of 1873—once on my way to Europe and once on my return—and I had interviews with Mr. Lawrence Wells on both occasions.

Seventh. To the seventh interrogatory he saith: I was pretty well posted as to all of the correspondence going on in our business and do not know of such correspondence as is inquired about.

Eighth. To the eighth interrogatory he saith: I returned to New Orleans in the first part of September. Mr. Lawrence Wells did, before my departure, give me a written memorandum, and the paper annexed to this deposition and subscribed by me now and marked "Exhibit A" is a true copy and translation of that memorandum.

72 Ninth. To the ninth interrogatory he saith: I never made any arrangement with either Mr. Lawrence Wells or any member of the firm of F. Schuchardt & Sons, and in the summer of 1873 never spoke even of these bonds, outside of a possible remark, to be positive, that nothing had happened to our trust in their hands; and nothing appears in the correspondence of our firm in reference to these bonds outside of the fact to ask of them to hold them in safe keeping. As to the memorandum referred to, nothing appears on it relative to the bonds, and I never made any agreement, verbal or otherwise, in reference to the bonds, with Mr. Wells or any one else, and never made with Mr. Wells or any one living any agreement or arrangement about the bonds or any other bonds to be held as general security in matters with the New Orleans National Banking Association, or even C. Cavaroc & Son; never had any conversation with Mr. Wells about the bonds in any manner whatever, outside of a remark, as above stated, in the summer of 1873, to know if our trust was all right in their vault, which any merchant would pass upon in conversation to be certain that no accident happened to the trust or deposit for safe keeping.

Last. To the last interrogatory he saith: I think in justice to all parties that I owe a full statement of all matters concerning these bonds, as much so as I seem to be the party who can testify the most to this matter. I should first tell that these bonds were purchased from the proceeds of bills of exchange sold on F. Dumont by the firm of C. Cavaroc, in the summer of 1870. Owing to the Franco-Prussian war, in the fall of 1870, the firm of C. Cavaroc sent these bonds to New York by express, and I went to New York for the purpose of securing a loan, which I did through Messrs. F. Schuchardt & Sons. The money borrowed I sent to England so as to have Mr. F. Dumont to protect the drafts drawn upon him. In

73 the spring of 1871, when the passions of war were cooled off and credit was partially re-established, the firm of C. Cavaroc & Son drew again on Dumont, paid the said loan to F. Schu-

chardt & Sons, and then the bonds were released. I could give the date if I had my papers here, but this was between March and May, 1871.

As the express charges were very heavy to bring back the bonds to New Orleans, and as New York was a better market when we wanted to dispose of the bonds, we then asked of F. Schuchardt & Sons the privilege to leave them with them for safe keeping.

From time to time we had our coupons detached, once by one of our clerks who visited New York, once by myself, and other times by the firm of F. Schuchardt & Sons, who would collect the same and place the amount to our credit on their books.

These bonds always remained for safe keeping with F. Schuchardt & Sons, and no conversation of any form whatever ever took place between Mr. Wells and myself. I could never have discussed the possibility of pledging these bonds in the summer of 1873, for they were not our property, and the proof of it laid in the fact that we had left them from the spring of 1871 without ever touching or using them when we had seen days that we had to use all our own securities and our credit.

Referring to the several conversations (in the summer of 1873) as to the amount of exchange F. Schuchardt & Sons would be willing to negotiate either for our firm or the New Orleans Banking Association, we came to the agreement to limit certain line of credits, and for that purpose the memorandum referred to was drawn, written by Mr. Lawrence Wells in my presence on a scrap of paper, which I distinctly recollect and which I could identify were I to see it. No question besides the fact of placing securities in trust in our hands, as described in the exhibit, was ever raised; no mention whatever ever made as to the two hundred and thirty-two thousand dollars of bonds, in this conversation or any previous.

74 Cross-examination:

First. To the first cross-interrogatory he saith: My conversations, correspondence, and, in fact, communications, were more generally in English, French being used, however, very frequently in conversation, but seldom in correspondence. I think the memorandum was partly written in French and partly in English, which, however, Mr. Wells and myself both fully understood.

Second. To the second cross-interrogatory he saith: I knew of all correspondence between my firm and F. Schuchardt & Sons, as when I was traveling I received regularly from my office copies of all correspondence to and from F. Schuchardt & Sons, as my clerks and correspondent were very particular in so doing.

Now, as I am away from the books of C. Cavaroc & C. Cavaroc & Son of that period, they being in New Orleans, I cannot state how many letters were received or sent, having only my memory to rely upon, and I do not know of any one who could swear to a number after such a lapse of time. I received my letters during my travels to the care of my bankers and correspondents in different cities, and would most generally read them there, as I had in every city where

I received letters a correspondent, at whose office I had a desk at my disposal, and where generally I would read my letters and answer them, either in French or English.

C. CAVAROC, JR.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 13th day of February, 1882, before—

PHILIP A. HOYNE,
Commissioner.

STATE OF ILLINOIS, }
County of Cook, City of Chicago, } *ss:*

I, Philip A. Hoyne, do certify that Charles Cavaroc, Jr., the
75 witness, personally appeared before me on the thirteenth day of February, at two o'clock in the afternoon, at my office, rooms 52 and 53, Custom-House building, in the city of Chicago, county of Cook and State of Illinois, and, after being sworn to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition and did in my presence subscribe the same and endorse the exhibit annexed thereto; and I further certify that I have subscribed my name to each half sheet thereof and to the said exhibit; and I further certify that neither or any of the said parties to the cause aforesaid appeared.

PHILIP A. HOYNE,
Commissioner.

DEFENDANT'S EXHIBIT D. Dec. 3, 1881.

DEFENDANT'S EXHIBIT A. C. Cavaroc, Jr.

(*Translation.*)

Not more than £10 | M per week on Hambro.
" " " fr. 200 | M on first bankers of Paris.

As much business paper (in French, *effets de commerce*) as shall be desired, we reserving the right (as much in the interest of the bank as in our own) to limit the amounts on any one house.

When the bank sends the drafts of the bank on third parties (Havre, Bordeaux, Marseilles, &c., &c.) it must put in the hands of Messrs. C. C. & Son, in trust, a deposit of securities, there to remain until the acceptance or the payment, if we deem proper to await the payment.

Lignouret's line, fr. 500 | M (for bank and C. C. & Son).

76 At the execution of a commission for the examination of a witness, wherein Frederick Dumont and others are complainants and Charles M. Fry and others are defendants, this paper writing was produced and shown to C. Cavaroc, Jr., and by him deposed unto at the time of his examination before—

PHILIP A. HOYNE,
Commissioner.

77 FEBRUARY 25TH, 1882.

WILLIAM H. LEUPP, recalled by Mr. PLATT:

In the course of this suit Mr. Fry, as trustee, has been put to certain legal expenses. In January, 1881, he paid $60 for costs in New Orleans, and in September, 1881, he paid $1,000 on account of counsel fees to Messrs. Rouse & Grant in the suit pending in reference to the coupons.

Schuchardt & Sons, in their business account with Cavaroc & Son and the New Orleans National Banking Association, charged and received their commissions as bankers; that was all their compensation.

WM. H. LEUPP.

Sworn to before me this 25th day of February, 1882.
WILLIAM BERNHARDT.
Notary Public, N. Y. Co.

LAWRENCE WELLS, recalled by Mr. HUTCHINS:

Q. When and from whom did you first hear of the two hundred and thirty-two bonds which are the subject of this suit?
A. From C. Cavaroc, Jr., in the fall of 1870.
Q. Where was that?
A. In New York.
Q. Do you remember what he told you about them?
A. Yes, sir.
Q. What did he say?
A. He wanted to use them as collateral to raise money.
Q. What did he say about these bonds when he first said anything to you about them, by way of description of them?
A. I don't remember particularly.
Q. State the best you can.
78 A. He spoke of them as New Orleans city bonds; he had them with him, as far as I remember. Our firm had not received them before that time, so far as I can recollect.
Q. If you remember anything else which Mr. Cavaroc, Jr., said as a description of the bonds, as how he came to get them, from whom he got them, or anything similar to that, please state it.
A. I recollect nothing further than that he mentioned that he considered it a good security, or something to that effect.

Cross-examined by Mr. PARSONS:

Q. When, if ever, did Mr. Cavaroc, Jr., give you any further information about the origin of the bonds?

Objected to by Mr. Platt as assuming that Mr. Cavaroc did give such further information.

A. I don't recollect his ever giving me any further information.
Q. Were there other occasions when the bonds were the subject of conversation between Mr. Cavaroc, Jr., and yourself?

A. I think they were alluded to in 1873, during his visit to New York, in the fall of 1873.

Q. Is that as positive upon the subject as you can be?

A. I feel quite confident they were alluded to in 1873.

Q. Is that as positive as you can be upon the subject?

A. Yes, sir.

Q. Can you recall nothing as said to you at any time by Mr. Cavaroc, Jr., on the subject of how he or his firm became possessed of the bonds?

A. Nothing very positive.

Q. Is what you mean that you can remember that the subject was spoken of, but that you cannot recall what was said?

A. That is what I mean.

79 Q. Was this in the first conversation between you about the bonds?

A. I think it must have been.

Q. At that time did you have information from any source about this lot of bonds other than from the Cavarocs?

A. No, sir.

Q. Can you recall any conversation between C. Cavaroc, Sr., and yourself upon the subject of how his firm became possessed of the bonds?

A. No, I cannot.

Q. Are you able to say whether or not there was such conversation?

A. I have no recollection at this time of any conversation. I cannot at this lapse of time say that there was or was not?

Q. When did you first become acquainted with the Cavarocs?

A. About 1867.

Q. Did you ever learn when these bonds first came into their possession?

A. No, sir.

Q. In the fall of 1870 were you acquainted with the pecuniary situation of the Cavarocs?

A. I thought I was.

Q. Were they borrowers from your firm about that time?

A. Yes; that is, we were under advances.

By Mr. PLATT:

Q. Please to give a general idea of the nature of the business of Cavaroc with Schuchardt & Sons?

A. The sale or negotiation of bills of exchange drawn by them on France and England and elsewhere.

Q. Didn't Cavaroc and Cavaroc & Son draw bills on Schuchardt & Sons which they excepted and paid for them?

A. Yes.

80 Q. Didn't the Cavarocs, besides sending Schuchardt & Sons their bills for sale, send them for sale bills of exchange which they bought in New Orleans?

A. Yes.

Q. Didn't Schuchardt & Sons endorse these bills when they sold them?

A. Yes.

Q. Did not Schuchardt & Sons credit the proceeds of these bills as soon as sold in the market in New York to the Cavarocs?

A. Yes.

Q. Didn't Schuchardt & Sons negotiate loans for the Cavarocs in New York from various institutions and firms?

A. Yes.

Q. Besides the loan requested by Cavaroc, Jr., in 1870, did or not Schuchardt & Sons make them another loan; if so, when and for what amount?

A. They did in the spring of 1871, one or more loans, I believe.

Q. How often did Schuchardt & Sons render accounts current to the Cavarocs?

A. I don't recollect whether monthly or quarterly.

Q. Did those accounts current contain all the transactions between the Cavarocs and Schuchardt & Sons?

A. They did.

Q. Including the various loans negotiated for Cavaroc & Son?

A. They did.

Q. Mr. Cavaroc, Sr., says, in answer to the third cross-interrogatory: "I never authorized Schuchardt & Sons to dispose of or borrow any money on these bonds." Is that so?

Mr. Parsons and Mr. Hutchins objects that the question incorporates only part of the third cross-interrogatory.

A. It is not.

Q. Mr. Cavaroc, Jr., says, in his deposition, in answer to the
81 last interrogatory, in substance, that these bonds, with the exception of the loan he obtained in 1870, always remained for safe keeping with F. Schuchardt & Sons and for nothing else. Is that so?

Mr. Parsons and Mr. Hutchins object that the question does not state correctly Mr. Cavaroc Jr.'s testimony.

A. No, sir.

Q. Up to the time of the pledge of these bonds for the New Orleans National Banking Association what did Schuchardt & Sons hold these bonds for?

Mr. Parsons and Mr. Hutchins object to the question as—1st, asking a conclusion; 2d, asking the judgment or inference of the witness; 3d, not inquiring for a fact.

A. As security for whatever Cavaroc & Son might be indebted for.

Q. When Schuchardt & Sons indorsed the bills of exchange for Cavaroc & Son how long did that liability run?

A. From about 70 to about 100 days.

Q. Was the amount of these liabilities large or small?

A. At that time it was very large.

Q. Can you give any of the amounts, approximately?

A. Sometimes over $100,000 in one day.

Q. Look at letter now shown you, purporting to be from C. Cavaroc & Son. Is it from them?

A. Yes.

Q. Refreshing your memory from that as to the time when Mr. Cavaroc, Jr., may have been in New York in 1873, and then referring to Exhibit A, annexed to Mr. Cavaroc Jr.'s deposition, and which is the same as that marked Defendant's Exhibit D, Dec. 3d, 1881, on page 58 of complainant's printed papers, and which Mr. Cavaroc, Jr., says you made, state, if so, about what time it must have been made.

A. It must have been the latter part of August or the early part of September, 1873.

82 Q. Do you mean to say that that English paper was given by you in English?

A. No, it wasn't.

Q. In what language.

A. In French.

Q. Looking at the translation, state what is the purport of it. What does it mean?

Mr. Parsons and Mr. Hutchins object that the paper speaks for itself.

A. It states the conditions and amounts to be forwarded and the requirement of the deposit of securities till the payment of bills negotiated.

Q. What is the meaning of "not more than £10M in one Hambro?"

A. That the amount forwarded in any one week on Hambro should not exceed the sum of £10,000 sterling.

Q. The same question as to the words "not more than 200,000 fr. on first bankers of Paris?"

A. That the amount of francs per week should be limited to 200,000 on A1 bankers.

Q. The same as to "as much business paper as shall be desired, right reserved to limit amounts on any one house."

A. That means bills of exchange drawn against shipments.

Q. Do you know whether that paper ever got to Cavaroc & Sons in New Orleans before their failure?

A. Yes, I think so; I don't know.

Q. Do you know that it did?

A. I do not.

Q. Was the object of that paper, or the intent of that paper, to alter or qualify the relations of your house with these bonds, either as to Cavaroc & Sons or the New Orleans Banking Association?

Mr. Parsons and Mr. Hutchins object as incompetent.

83 A. It was not.

Q. Were you and Mr. Schuchardt, both or either of you, well acquainted with French? Did you or not correspond, both of you, in French with your correspondents?

A. Yes.

By Mr. HUTCHINS:

Q. How large were the amounts of the liability incurred by your firm for the N. O. Banking Association?

A. For millions of dollars at a time; sometimes they sent over a million in one day.

By Mr. PLATT:

Q. What did Schuchardt & Sons make out of these transactions?

A. A commission of from $\frac{1}{4}$ to $\frac{1}{2}$ per cent.

Q. Did Schuchardt & Sons keep a safe deposit?

A. No.

Q. Were they warehouse men?

A. No.

By Mr. PARSONS:

Q. Where did they keep these securities?

A. In a box in safe deposit and a box in bank.

By Mr. PLATT:

Q. Did they deposit them in their own compartment, with their own securities?

A. Yes, sir.

LAWRENCE WELLS.

Sworn to before me this 25th day of February, 1882.

WILLIAM BERNHARDT,
Notary Public, N. Y. Co.

It is hereby stipulated that the foregoing testimony of William H. Leupp and Lawrence Wells was duly and legally taken
84 as part of the testimony in this action, and may be read by either party upon the hearing of this action.

Dated February 25, 1882.

PLATT & BOWEN,
Solicitors for Defendant Fry.
EDGAR A. HUTCHINS,
Complainants' Solicitor.
MAN & PARSONS,
Attorneys — Defendants Reynes and Ano'r.

85 U. S. Circuit Court, Southern District of New York.

FREDERICK DUMONT, AUGUST HENRY REINE, and JEAN DAVID MOEKEL

ag'st

CHARLES M. FRY, Trustee of Schuchardt & Sons, Impleaded with FRANCOIS LABORDE and Others.

Testimony in behalf of the defendant, Charles M. Fry, trustee, taken before Edward L. Owen, U. S. commissioner, under and in pursuance of the notice hereto annexed.

86 OCTOBER 11TH, 1877.

Pursuant to notice, parties appear.

Messrs. Platt, Gerard, and Bowers, solicitors for defendant, Charles M. Fry.

Mr. Edgar A. Hutchins, solicitor for complainants.

Messrs. Scott & Crowell, solicitors for Louisiana National Bank; Charles E. Whitehead, solicitor for Casey, receiver.

CHARLES DE RUYTER, a witness produced on behalf of defendant, Charles M. Fry, trustee, deposes and says as follows:

I am a resident of New Orleans, and have resided there for the last twelve years. In 1873 I was one of the directors of the New Orleans National Banking Association. There was a record kept of the meetings of the board of directors of that association. After the failure of the bank that book of proceedings and minutes went into the possession of the receiver of the bank, Mr. John Cochran. Mr. Blache, a former cashier of the bank, acted as clerk for the receiver. I saw the minute book in Mr. Blache's possession, and asked him to let me look at it to see what had been done in my absence. This was after the appointment of a receiver. Mr. Blache was then acting as clerk for the receiver. I read and examined the minute book. At that time I read in that book the minutes of a meeting of the board of directors of that bank on September 20th, 1873. I procured a copy of the minutes of that date. Mr. Blache furnished me the copy. I cannot swear that it is a correct copy because I did not copy it myself. I ran my eye over it at the time he furnished it. I found it to agree with my memory of the contents of the minute book. It agrees with my memory of the contents now.

87 Paper offered in evidence objected to because there is on proof that it is a copy and as incompetent; same marked "Defendants' Exhibit 1, E. L. O., Oct. 11th, 1877."

It is in the handwriting of Mr. Blache.

1 Q. Speaking from your present memory, please state substantially what you remember of the contents of the resolution which you read in these minutes.

Objected to by all as incompetent and irrelevant.

A. I remember that at the time I read over these minutes I was struck by this resolution giving Mr. Cavaroc $100,000 security from the bank, and thereupon I asked Mr. Blache for a copy of these minutes, which copy, "Exhibit 1," just read to me, agrees with my recollection of the minute as read by me in the book. I was in New York in September, 1873. I got back to New Orleans after the failure of the bank, and I am about to leave this State for New Orleans in a few days.

Cross-examined by Mr. HUTCHINS:

I am very familiar with Mr. Blache's handwriting. I was director in the bank during all the time he was cashier, and before that time he was exchange clerk. I did not see him make this copy. It is all in his handwriting.

CHARLES DE RUYTER.

Subscribed and sworn to before me this 11th day Oct., 1877.
EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

88 *Extract of Minute Book.*

Called meeting.

NEW ORLEANS NAT. BANKING ASS'N,
NEW ORLEANS, *Sept. 20th*, 1873.

Present: C. Cavaroc, pres't; A. Tertrou, J. Aldige, John Rocchi, H. A. Mouton, P. S. Wiltz, L. Haas, Jr.

The president stated that the object of the meeting was to inform the board of the unpleasant state of affairs in general, and particularly of the panic then prevailing in New York.

The suspension of Jay Cooke & Co., which was already announced, and which no doubt would be followed by many others, would surely tend to increase the present uneasiness and render our money market still more stringent. He would therefore ask the board to suggest or adopt such measures as in their judgment they would think expedient to avert the impending crisis; whereupon it was unanimously—

Resolved, That all precautionary measures to be taken be left entirely to the discretion of the president, the board hereby ratifying all that may be done by him. It is further—

Resolved, That with a view of securing the president against any eventual loss of the 232 7 per cent. city of New Orleans bonds belonging to the firm of C. Cavaroc & Son and actually pledged to F. Schuchardt & Sons, agents of the bank at New York, as collateral security for the payment of all foreign exchange bills sent them for negotiation and by them endorsed, that he be, and is hereby, authorized to select as guarantee from the portfolio of the bank such pa-

pers as he may think proper, to the extent of ($100,000) one hundred thousand dollars.

On motion, it is further—

Resolved, That the board hereby tender their thanks for the aid he is individually lending by leaving undisturbed a large
89 cash balance, ($80,000) eighty thousand dollars, standing to the credit of C. Cavaroc & Son on the books of the bank.

And the board adjourned.

(Signed) C. CAVAROC, *President.*
HENRY BLACHE, *Cashier.*

DEFENDANT'S "EXHIBIT 1." E. L. O., October 11th, 1877.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, Edward L. Owen, the commissioner before whom the foregoing testimony was taken, do hereby certify that I was attended by the solicitors for the respective parties and the witness; that the witness was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in respect of the matters to be inquired of; that by consent of solicitors the testimony was by my clerk reduced to writing, and after carefully reading the same over to the witness he subscribed the same in my presence. I further certify that I am not of counsel for either of the parties to said case nor in any manner interested in result of said case.

In testimony whereof I have hereunto subscribed my name and affixed my seal this 11th day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and the Independence of the United States the one hundred and second.

[SEAL.] EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

90 United States Circuit Court, Southern District of New York.

FREDERICK DUMONT *et al. ag'st* CHARLES M. FRY, Trustee, *et al.*

It is hereby admitted and I stipulate to admit at the trial of this cause that the deposition of Charles De Ruyter, taken in this action by the defendant Fry, was duly and legally taken, and to allow the copy of the resolutions of the New Orleans National Banking Association thereto attached to be read in evidence as duly, properly, and legally proved.

I further stipulate that I will not call on this cause for trial against Mr. Fry within one week after the commission therein has been returned, opened, and notice given to his solicitors.

New York, June 9, 1881.

EDGAR A. HUTCHINS,
Complainants' Sol'r.

91 U. S. Circuit Court, Southern District of New York.

FREDERICK DUMONT *et al.*
against
CHARLES M. FRY, Trustee, &c., Impleaded with FRANCOIS LABORDE *et al.*

Testimony on behalf of defendant, Charles M. Fry, trustee, taken before Edward L. Owen, special examiner, by consent.

DECEMBER 1ST, 1881.

Present: Edgar A. Hutchins, solicitor for complainants; Platt & Bowers, for defendant Fry; Man & Parsons, for defendant Laborde and others, assignees.

WILLIAM BOSWELL, a witness produced on behalf of defendant Fry, being duly sworn, deposes and says as follows:

I am thirty-seven years of age; I reside at Plainfield, New Jersey, and in January, 1874, I was managing clerk for Platt, Gerard & Buckley, and had charge of and made the entries in their register. On the third day of January, 1874, they commenced an action in the supreme court of the State of New York for Frederick Schuchardt & Sons against F. Dumont & Co., the parties who are
92 complainants in this action, on ten bills of exchange, amounting to 200,000 francs. An attachment was issued the same day against their property as non-residents and duly delivered to the sheriff of the city and county of New York the same day, and duly levied on property in the hands of Schuchardt & Sons, consisting of the bonds which are the subject of this action.

The defendants appeared by Messrs. Hutchins & Clinch, and that action is still pending.

Cross-examined by Mr. HUTCHINS:

The bills of exchange were drawn by C. Cavaroc & Son on F. Dumont & Co. and accepted by them.

WILLIAM BOSWELL.

Subscribed and sworn this 1st day of December, 1881.
EDWARD L. OWEN,
U. S. Commissioner, Special Examiner.

Before the witness Boswell signed, Messrs. Man & Parsons requested that his deposition might be left open until Mr. Parsons could have an opportunity to examine the testimony.

Mr. Platt objects.

LAWRENCE WELLS, a witness produced on behalf of the defendant Fry, being duly sworn, deposes and says as follows:

1 Q. You are of the firm of Frederick Schuchardt & Sons?
A. Yes.

2 Q. What was your business?

A. Bankers.

3 Q. Look at this paper purporting to be a letter by the defendant, C. Cavaroc, dated the 15th of February, 1873, and state whether you know the signature and whether it was received by your firm.

A. I know it to be the signature of C. Cavaroc, and
93 was received by my firm on the 24th of February, 1873.

(The letter is given in evidence: "Exhibit No. 2 on the part of defendant Fry, Dec. 1, E. L. O.")

4 Q. Have you made a translation of that letter?

A. Yes; and this is the translation.

("Exhibit No. 3 on the part of the defendant Fry, Dec. 1, '81, E. L. O.")

5 Q. Are you acquainted with French—commercial French? How and under what opportunities have you acquired your knowledge?

A. I was in business in Marseilles for a number of years, where the language was entirely French, and I have also studied it at school before going there; and I was also brought up in a French counting-house in New York.

6 Q. Is that translation correct?

A. I so consider it.

7 Q. In the course of the translation did you consult any authority?

Objected to by Mr. Hutchins and Man & Parsons.

A. I did.

8 Q. I refer you to the French Dictionary of A. Spiers, published in Paris, 19th edition, by Bramard, Baudry & Co., 12 Rue Bonaparte, 1866, and ask you what is there given as the translation of the word "*decouvert?*"

(Same objection.)

A. "*Decouvert*, n. m. 1 (com.) (of accounts), uncovered balance."

9 Q. When did Schuchardt & Sons receive these bonds and from whom?

A. 20th of September, 1870, from C. Cavaroc, Jr., in New York.

10 Q. Please to state what directions you received from C.
94 Cavaroc or C. Cavaroc & Son, if any, relative to these bonds, and what transactions you made pursuant to these directions and their dates.

Objected to, except so far as it refers to the personal actions of the witness, by both counsel.

A. On the 20th of September, 1870, we deposited with M. Morgon's Sons the above $275,000 New Orleans bonds against a loan made by them of $200,000 to the Bank of New Orleans, and $110,000 to C. Cavaroc as part collateral for those loans. On the 21st December, 1870, M. Morgan's Sons returned us the above bonds against the payment of the two loans. On the 6th of March, 1871, we de-

livered $5,000 of the above bonds to Henry Beers by order of C. Cavaroc. On the 1st of April, 1871, we delivered $160,000 of above bonds to Marks & Febre by order of C. Cavaroc. On the 29th of May, 1871, we delivered $110,000 of above bonds to M. Morgan's Sons against a loan of $100,000. On the 30th May, 1871, Marks & Febre returned us above $160,000 bonds, against which we loaned Cavaroc $100,000, falling due 2d of October, 1871. On the 2d of October, 1871, M. Morgan's Sons returned us the $110,000 bonds on payment of their loan. On the 27th of February, 1872, we forwarded to Cavaroc, at New Orleans, $8,000 of above bonds as per his order. On the 13th of April, 1872, we delivered $160,000 of above bonds to Importers' & Traders' National Bank of this city by order of Cavaroc. On the 28th of June, 1872, the Importers' & Traders' National Bank returned us the above $160,000 bonds. On the 31st of August, 1872, we delivered $30,000 of above bonds to Spofford Brothers & Co. by order of Cavaroc. On the 27th of May, 1873, we delivered $50,000 of the above bonds to the Importers' and Traders' National Bank of New York by order of Cavaroc. On the 3d of September, 1873, the Importers' and Traders' National Bank returned the above $50,000 bonds.

95 11 Q. For whom was the $110,000 loan from M. Morgan's Sons May 29th, 1871?

A. I presume for Cavaroc, but I am sure either for Cavaroc or the Bank of New Orleans.

12 Q. Who was the active member of your firm?

A. Mr. Schuchardt and myself were the only two partners and we were equally active; his son Frederick died some years before that.

13 Q. How did you understand to be the matters for which Mr. Cavaroc deposited these bonds with your firm as collateral in relation to your transactions with the New Orleans National Banking Association?

Objected to by both counsel.

A. To secure the indebtedness of the bank towards my firm.

14 Q. At any one time or as continuing or how?

Objected to by both counsel. Question withdrawn.

15 Q. Did you consider it at the time as held for any balances which might arise against the bank or how?

Objected to by both counsel.

A. For any balances that the bank might owe.

16 Q. When?

A. At that or at any future time.

— Q. I will refer you to Spiers' Dictionary again, at page 158, and ask you to state what is there as to this expression, "*a decouvert.*"

A. "(Com.) (of accounts) overdrawn."

Cross-examined by Mr. HUTCHINS:

18 X Q. Look at your exhibits of this day, Nos. 2 and 3, and state

what are the French words which you have translated at the end of Exhibit 3, in case of "(unsecured—uncovered) balance of account."

A. "*En cas de decouvert.*"

19 X Q. What kind of business were you in in Marseilles?

96 A. Business of exporting and importing merchandise. There was no more banking connected with it than ordinary merchants have. The counting-house which I have referred to as having been brought up in was in the same line of business.

20 X Q. Why did you not translate the word "*decouvert*" in Exhibit 2 according to the translation read by you from Spiers' Dictionary?

A. I put it at first "unsecured," but, turning to the dictionary, I saw it "uncovered," and added it. I first used the word "unsecured" because I considered it better English.

21 X Q. Was the testimony which you have just given of the transactions in reference to these $275,000 New Orleans bonds testimony of transactions in all of which you yourself took part?

A. No; I think not. The number of bonds we received at first was $275,000. They were negotiable bonds, payable to bearer.

22 X Q. How many and which of the transactions in regard to these bonds to which you have testified were personally transacted by you for your firm?

A. All except those of 29th and 30th of May, 1871, to the best of my knowledge. I do not remember what was the authority from Cavaroc for those transactions, but I am sure that my firm had authority from him in writing.

23 X Q. In the letter of your firm to N. Augustin, cashier of the New Orleans National Banking Association, dated New York, December 4th, 1871, and put in evidence in this case by complainants, you say, "We presumed also that when the loan of the trust company, which falls due on the 21st instant, will be paid the securities will be replaced in our possession." Are those securities the bonds which are the subject-matter of this suit?

A. I have not the slightest recollection of any loan by any trust company on those bonds. Those bonds were demanded

97 of us by C. Cavaroc & Son about October 9th, 1873, and delivery refused by us.

24 X Q. What, if any, authority have you for holding these bonds and coupon money as collateral for the indebtedness of the New Orleans Banking Association other than the letter, Exhibit 2 for defendant Fry?

A. A general understanding to that effect arrived at with conversations with C. Cavaroc, Jr.

25 X Q. When?

A. At different times when he was in New York; among others, in August or September, 1873.

26 X Q. What is your best recollection of that general understanding then made?

Objected to unless the writing is produced.

A. My understanding was that bonds were to be left with us

against any indebtedness of the bank [and I would not have delivered them while the account was running].

Mr. Hutchins moves to strike out part of answer in brackets as not responsive.

27 X Q. Have you answered the last question as fully as you can?

A. I think that covers the ground.

Q. Question repeated.

Objected to.

A. I don't know how to answer that question any further.

28 X Q. Have you any written authority to hold those bonds as collaterals for the indebtedness of the New Orleans National Banking Association other than the letter, Exhibit 2 of defendant Fry?

A. Not that I know of.

Messrs. Mann & Parsons request that Mr. John E. Parsons have an opportunity to cross-examine the witness before the ex-
98 amination is closed, stating that Mr. Parsons is actually engaged in the trial of a case.

Mr. Platt objects.

LAWRENCE WELLS.

Subscribed and sworn to before me 1st day of December, 1881.

EDWARD L. OWEN,
U. S. Commissioner, Special Examiner.

Adjourned to the 2d December, 1881, at 11 a. m.

DECEMBER 2D, 1881.

Pursuant to adjournment, parties appear.

Mr. Wells appears for cross-examination by Mr. John E. Parsons.

Mr. Man, representing Mr. Parsons, says that Mr. Parsons is actually engaged in the trial of an action before Judge Russell and a jury, which trial was commenced two days ago or more, and which he has been unable to finish within the time he expected. Mr. Man therefore applies to have the cross-examination of Mr. Wells postponed to December 3d, at one o'clock, at which time Mr. Parsons expects to be disengaged.

Mr. Platt objects to this adjournment and also to the power of the examiner to grant such an adjournment.

The examiner adjourns the cross-examination to December 3d, at 1 o'clock.

WILLIAM H. LEUPP, a witness produced on behalf of the defendant Fry, being duly sworn, deposes and says as follows:

99 1 Q. How long were you in the employment of Schuchardt & Sons, and what position did you occupy during the years 1873 and 1874?

A. Upwards of twelve years; was cashier, I think, during 1873 and 1874, and since Schuchardt's failure, with Charles M. Fry, assignee and trustee in the liquidation of the estate of Schuchardt & Sons.

2 Q. Was Schuchardt & Sons in the habit of rendering an account current to the New Orleans National Banking Association; and, if so, about how often?

A. Yes, monthly.

3 Q. One of the complainants' witnesses speaks of one of these account currents rendered as of the first of October, 1873; do you recognize the account current that he refers to?

A. I do, sir.

4 Q. Wasn't that account actually made up to the 4th of October, 1873, the date of the bank's failure?

A. No, sir; it was only made up to the first of October and sent off.

5 Q. By that account current, what was the balance stated to be due from the bank at that date?

A. $4,121.92.

6 Q. This account current comprised the transactions for the month of September, did it not?

A. Yes, sir.

7 Q. What was the amount of the debit side of that account current?

A. $688,459.13.

8 Q. And the credit side was that amount less this $4,121.92?

A. Yes, sir.

9 Q. When the remittances of paper arrived in New York, what was done with them in account?

A. They were credited.

10 Q. Do you mean in the account current spoken of?

A. Yes, sir.

11 Q. Were they credited as so much money at once without waiting for their realization?

A. Yes, sir.

12 Q. When any paper so credited was returned protested, what then was done?

A. It was charged to the same account as originally credited.

100 13 Q. Did, to your knowledge, Schuchardt & Sons ever assume or take such protested paper as a payment by the bank?

Objected to by opposing counsel.

A. No, sir.

14 Q. Did you know or have you ever heard of any custom among bankers to consider such papers when received as payment without reference to its future fate, or payment or non-payment?

Objected to by opposing counsel.

A. No, sir.

15 Q. Were not some of the credits contained in that account current of October 1st, 1873, returned unpaid?

A. Yes, sir.

16 Q. I mean some of the credits by which the debit side of that account was reduced down to this small amount of $4,121.92?

A. Yes, sir.

17 Q. Have you any means of giving those items or some of them; if so, please to give them, with their damages.

A. On the 28th of October, 1873, protested drafts on G. Honorat & Co., of Marseilles, for 165,000 francs, equal to $33,846 15
On the 29th of December, 1873, protested drafts on Seignouret Freres & Co., of Bordeaux, 275,000 francs, equal to 56,410 26
January 12th, 1874, protested drafts on A. Dutfoy & Co., of Paris, 440,000 francs, equal to 90,256 41
Also, under date of November 17th, 1873, an unpaid acceptance of S. Frank & Co., of New York, for 12,500 00
Also an unpaid draft on the National Park Bank of New York for (charged under date of October 7th, 1873) ... 353 00
Also protest fees, &c., amounting to about 15 00

The above accounts were currency accounts.

101 This bank also had a gold account, which was rendered for the time from 1st of July, 1873, to the 1st of October, 1873, with a balance to the debit of the bank of $68,231.17; this was afterwards reduced to $14,691.05.

18 Q. Was this gold account an account of their exchange operations?

A. A portion of the gold account was—I mean a portion of their exchange operations was—passed through their gold account, but other matters were also contained in their gold account.

19 Q. What did Schûchardt & Sons claim to be the balance in their favor against the bank after the failure of the bank?

Objected to by opposing counsel.

A. About $200,000.

20 Q. What amount did they prove against the bank in bankruptcy?

A. $195,315.63; they proved it in New Orleans.

21 Q. Will you please make out and annex to your deposition a schedule of the items of the gold account not connected with their exchange operations?

A. Yes, sir.

22 Q. After the account current with the firm of Cavaroc & Co. was rendered to them, was not the amount of the balance due from them increased by subsequent recovery against Schuchardt & Sons on acceptances of their bills? State the transaction.

A. Yes, sir; it was increased. About the date of the failure Schuchardt & Sons telegraphed to Cavaroc & Son that, owing to the panic then existing, to limit exchange operations as much as possible and not to draw against exchange sent except upon telegraphic

authority from Schuchardt to do so. $30,000 were drawn and not honored by Schuchardt; suits followed; the claim on one draft of $10,000 was disallowed and judgment rendered upon the $20,000 draft; this judgment was settled for $9,500, which increased Cavaroc's balance to $17,305.73.

102 Cross-examined by Mr. HUTCHINS:

23 X Q. Look at Exhibit B, attached to testimony of Charles Cavaroc, Senior, and state whether the drafts for 200,000 francs drawn on Dumont & Co. by C. Cavaroc & Son, for the non-payment of which a suit was brought in January, 1874, in the supreme court of the State of New York by Schuchardt & Sons against F. Dumont & Co., appear in that account.

A. Yes, sir; they are here.

24 X Q. On which side of the account?

A. Both sides.

25 X Q. So that the payment of the balance due on that account results in the payment of those drafts?

Objected to by Mr. Platt.

A. Yes, sir.

26 X Q. Did Schuchardt & Sons collect the coupons attached to these $232,000 of bonds which fell due December 1st, 1873; and, if so, when and how much?

A. They did, about December 1st, 1873, amounting to $8,120.

27 X Q. Does that amount appear in the account current which you rendered Cavaroc & Son, being Exhibit B, attached to testimony of C. Cavaroc, Senior?

A. No, sir.

28 X Q. Have you collected anything since on account of the coupons of those bonds?

A. Yes, sir; the coupons falling due June 1st, 1874, amounting to $8,120; also those due December 1st, 1874, which were paid in New Orleans, amounting to $8,094.70.

29 X Q. What has become of the proceeds of those coupons?

A. They have been credited in a separate account, and Mr. Fry holds them as a separate trust, subject to the decision as to the ownership of the bonds.

30 X Q. Were the amounts given by you on your direct examination as additional debits against the New Orleans Banking
103 Association after their failure the amounts of their drafts or those amounts with damages for non-payment added?

A. As to foreign drafts, the amounts given by me include ten per cent. added as damages for non-payment, but these damages were not allowed in bankruptcy.

Further examination of Mr. Leupp adjourned to December 3d, 1881, at 1 o'clock p. m.

DECEMBER 3D, 1881.

Pursuant to adjournment, all parties appear, and also Mr. Parsons, who appears for Messrs. Cavaroc & Son.

Cross-examination by Mr. HUTCHINS of witness LEUPP continued:

31 X Q. Is Exhibit B, annexed to deposition of Charles Cavaroc, Senior, a correct copy of the account current furnished by you to C. Cavaroc & Son on January 12th, 1874?

A. It is.

32 X Q. What was the difference between the kind of foreign exchange contained in your gold account and foreign exchange mentioned by you as resulting in the indebtedness founded upon the drafts unpaid by Honorat, Seignouret Freres, A. Dutfoy & Co., and the draft on the National Park Bank of New York?

A. The drafts on Dutfoy, Seignouret and Honorat were foreign exchange bills known as "clean"—that is, unaccompanied by documents—drawn by the New Orleans Banking Association on those parties. The one on the National Park Bank was drawn by the New Orleans National Banking Association to settle a collection made. The bills of exchange that figure up on the gold account were mainly cotton shippers' exchange accompanied by bills of landing.

33 X Q. Has anything been done by Mr. Fry for the collection of any of these coupons on these $232,000 bonds; and, if so, what?

104

A. Proceedings have been had and two judgments been taken against the city of New Orleans for about $97,440. That includes he coupons up to and including December 1st, 1880, I think.

Cross-examined by Mr. PARSONS, of counsel for the assignees of Cavaroc & Son:

34 X Q. When, if ever, did you become personally acquainted with either of the Messrs. Cavaroc?

A. Some years before the failure of Schuchardt & Sons, which was in September, 1875. It was prior to the failure of Cavaroc & Son; they failed October 4th, 1873.

35 X Q. Did you see either of the Messrs. Cavaroc in 1873?

A. Yes, sir.

36 X Q. Which one?

A. Charles Cavaroc, Junior.

37 X Q. Where?

A. At the office of Messrs. Schuchardt & Sons, in the city of New York.

38 X Q. When?

A. Shortly after their failure.

39 X Q. Was either of them in New York in 1873 prior to the failure?

A. I couldn't say.

40 X Q. What is your best recollection?

A. I have none.

41 X Q. Were you familiar with the business arrangements of Messrs. Schuchardt & Sons at this period?

A. Yes, sir; in a general way.

42 X Q. Did you at any time know of the correspondence between them and the Messrs. Cavaroc?

A. No, sir.

43 X Q. Did you know anything of a written memorandum made by Mr. Wells in reference to the business arrangements between Messrs. Schuchardt and Messrs. Cavaroc on the occasion of a visit by Mr. Cavaroc, Junior, in the summer of 1873?

A. No, sir.

Witness, recalled by Mr. Fry's counsel, desires to explain his answer to the question No. 25 X:

105 I mean by my answer to the 25th X question that the bills on Dumont & Co. would be paid, leaving any other indebtedness of Cavaroc to Schuchardt & Sons for later settlement.

By Mr. HUTCHINS:

44 X Q. Do you know of any indebtedness of Cavaroc & Son to Schuchardt & Sons not represented in Exhibit B, annexed to deposition of Charles Cavaroc, Senior, resulting in the balance of $7,454.22 other than the $9,500 spoken of by you as paid by Schuchardt & Sons in settlement of the drafts held by the Louisiana National Bank?

Objected to by Mr. Fry's counsel.

A. No, sir.

45 X Q. And that $9,500 is all that you know of which could alter that balance.

Objected to by Mr. Fry's counsel.

A. Yes, sir.

WM. H. LEUPP.

Sworn before me this 3d day of December, 1881.

EDWARD L. OWEN,
U. S. Commissioner, Special Examiner.

LAWRENCE WELLS, being cross-examined by Mr. PARSONS, of counsel for the assignee of Messrs. Cavaroc & Son, testifies:

29 X Q. Was Mr. Cavaroc, Junior, in New York in 1873 prior to the failure of his firm?

A. He was, in August or September, 1873.

30 X Q. Did you see him elsewhere in that year prior to the failure in New York?

A. No, sir.

31 X Q. What is your best recollection of the date of Mr. Cavaroc's departure from New York?

A. The early part of September, 1873.

106 32 X Q. Do you recall, shortly before his leaving, making a written memorandum of the result of the conversations that you had had with him?

Objected to by counsel for Mr. Fry.

A. Since seeing a memorandum which Mr. Hutchins showed me the other day I recollect having noted on a piece of paper the amount of bills we were willing to receive on certain parties, but, as far as I remember, nothing further.

33 X Q. Do you recall what you did with the memorandum?

A. I presume Cavaroc took it.

34 X Q. Did you recognize the memorandum produced by Mr. Hutchins as a copy of the one to which you refer?

A. As far as I recollect the substance of the memoranda, yes; but I can't say whether it is the same words; I don't know.

(Paper shown to witness.)

35 X Q. Is the memorandum now shown you that to which you refer as being shown to you by Mr. Hutchins?

A. That is the one shown me by Mr. Hutchins.

(Paper offered in evidence marked "Def'ts' Exhibit D, Dec. 3d, 1881, E. L. O.")

36 X Q. Shortly after the departure of Mr. Cavaroc, Jr., do you remember writing him a letter on the subject of such conversations as you had had with him?

Objected to by Mr. Fry's counsel.

A. Couldn't say without refreshing my memory. I probably did.

37 X Q. Look at the paper now shown to you, purporting to be the translation of a French letter from you to him, dated September 19th, 1873, and state whether that refreshes your recollection.

Counsel for Mr. Fry objects.

A. I recollect having written a letter somewhat to this effect, but I cannot say whether exactly as this is, especially as it is a very poor translation.

107 38 X Q. Having seen the paper shown you, what is your best recollection whether Mr. Cavaroc did write you or your firm under date of September 15th, 1873, and that you answered under date of September 19th, 1873?

Objected to by Mr. Fry's counsel.

A. I should like to say I can't fix the dates. I have no doubt I received a letter at or about that date, and that I answered at or about that date.

39 X Q. Can you by the aid of this translation remember the substance of what you wrote to Mr. Cavaroc?

Objected to by Mr. Fry's counsel.

A. I think that translation contains the substance of what I wrote.

(Translation marked "A, for identification, Dec. 3, 1881.")

40 X Q. Were press copies kept of your letters?

A. Press copies were made at the time.

41 X Q. What became of Mr. Cavaroc's letter and the press copy of your answer?

A. I really don't know.

42 X Q. Did Mr. Fry take possession of the books and papers of your firm?

A. I believe he did. I didn't see Mr. Fry take them, and I can't swear that he did.

43 X Q. Did you see Mr. Cavaroc, Jr., between the time of his departure from New York on the occasion referred to and the failure of his firm?

A. I think not.

44 X Q. Was your letter to Mr. Cavaroc written to him at New Orleans—the letter of September 19th, 1873?

A. According to my present recollection, it was.

Redirect examination:

45 Q. Do you know or did you ever know of any custom of bankers or brokers in New York or New Orleans that on the receipt of the paper from the New Orleans Banking Association and
108 its credit to them in account when it was received was a discharge of their liability previously existing, and on account of which this remittance was made, without reference to whether it was subsequently paid or honored or not?

Objected to by Mr. Parsons and Mr. Hutchins for form and substance.

A. No, sir.

LAWRENCE WELLS.

Sworn to before me this 3d day of December, 1881.

EDWARD L. OWEN,
U. S. Commissioner, Special Examiner.

Further examination of witnesses adjourned to day to be fixed.

EXHIBIT No. 2 on the Part of Defendant Fry. December 1, 1881.
E. L. O.

NEW ORLEANS, *the* 15 *Fevrier*, 1873.

Messieurs F. Schuchardt & Sons, New York:

MESSIEURS & AMIS:

Dans votre lettre du 11 ct, vous dites: The credit of $100 M à découvert was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement cancelled.

Vous savez que le change a New Orleans est a cheté en faisant des avances jusque à ce que les traites soient livrées & c'est
109 afin d'activer nos rapports que nous vous avions demande, à l'epoque, ce découvert.

Devant votre observation, il n'y a rein à dire si ce n'est de vous autoriser à considérer comme sécurité collatérale une partie des "bonds" que vous avez á ma maison, en cas de découvert.

Votre dévoué, C. CAVAROC.

EXHIBIT No. 3 on the Part of the Defendant Fry. December 1, 1881. E. L. O.

(Translation.)

NEW ORLEANS, 15 *February*, 1873.

Messrs. F. Schuchardt & Sons, New York.

DEAR SIRS: In your letter of 11th inst. you say "the credit of $100 | M *à decouvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we of course supposed the agreement cancelled."

You are aware that exchange is purchased at New Orleans by making advances until the delivery of the drafts, and it was for the purpose of giving activity to our correspondence that we at the time requested this *decouvert*.

In the face of your observation there is nothing to say except to authorize you to consider a part of my firm's bonds which you have as collateral security in case of (unsecured—uncovered) balance of account.

Yours truly,
(Signed) C. CAVAROC.

110 DEFENDANTS' EXHIBIT D. December 3, 1881. E. L. O.

(Translation.)

Not more than £10 | M per week on Hambro.

Not more than fr. 200 | M on first bankers of Paris.

As much business paper (in French, *affets de commerce*) as shall be desired, we reserving the right (as much in the interest of the bank as in our own) to limit the amounts on any one house.

When the bank sends the drafts of the bank on third parties (Havre, Bordeaux, Marseilles, &c., &c.) it must put in the hands of Messrs. C. C. & Son in trust a deposit of securities, there to remain until the acceptance or the payment, if we deem proper to await the payment.

Seignouret's line, fr. 500 | M (for bank & C. C. & Son).

111 U. S. Circuit Court.

FREDERIC DUMONT *et al. ag'st* CHARLES M. FRY, Trustee, *et al.*

JUNE 27, 1882.

WM. H. LEUPP recalled by Mr. PLATT.

Examined by Mr. HUTCHINS:

Q. What was the manner in which business was conducted between C. Cavaroc & Son and F. Schuchardt & Son?

A. The firm of C. Cavaroc & Son conducted a merchandise as well as a banking business, and were large shippers of cotton abroad. Against these shipments they drew bills of exchange, which were sent to F. Schuchardt & Sons for negotiation and sale in the New York market, C. Cavaroc & Son drawing their drafts on F. Schuchardt & Sons against the proceeds of their bills of exchange. F. Schuchardt & Sons honored their letters of credit and were their financial agents in New York city for money matters generally. F. Schuchardt & Sons procured loans for them.

Examined by Mr. PARSONS:

Q. Were the bills of exchange which were sent by Cavaroc & Son to Schuchardt & Sons for negotiation and sale, as stated
112 by you, accompanied by the bills of lading and other documents for the cotton against which the exchange was drawn?

A. Not always.

Q. Can you specify any case in which that was not done?

A. I think so.

Q. Are you quite sure that you can specify a case in which that was not done?

A. I think so.

Q. Is that as strong a statement as you can make?

A. Yes, sir.

Q. Was it the course of business for the bills of exchange to be accompanied by the bills of lading and other documents for the cotton?

A. I think it was.

Q. Do you know by whom was made the arrangement under which Schuchardt & Sons honored Cavaroc & Son's letters of credit and acted as their financial agents in New York, and whether the arrangement was verbal or in writing?

A. No, sir.

Q. In testifying that Schuchardt & Sons procured loans for Cavaroc & Son do you refer to the transactions about which Mr. Wells testified?

A. Yes, sir.

Q. In testifying that Schuchardt & Sons were financial agents in New York for Cavaroc & Son for money matters generally do you refer to matters other than those which you have specified?

A. No, sir.

Examined by Mr. PLATT:

Q. F. Schuchardt & Sons were bankers, were they not?

A. Yes, sir.

Q. Were they and their predecessors whom they had succeeded in such business for a long or short time?

A. A long time.

Q. Did they or not do what would be usually called Cavaroc & Son's banking business in the city of New York?

(Objected to by Mr. Parsons and Mr. Hutchins that the witness has already specified the business which was conducted between the two houses, and that it is not for him to say whether that would be usually called a banking business or not.)

113

A. Yes, sir.

Q. Didn't they have the funds of Cavaroc & Son in New York on deposit with them?

A. Yes, sir.

Q. Didn't Cavaroc & Son check on those deposits or draw at sight on them?

A. Yes, sir.

Q. Wasn't the balance of Cavaroc & Son's account fluctuating from day to day?

A. Yes, sir.

Q. Wasn't it considered a good account by F. Schuchardt & Sons?

A. Yes, sir.

Q. Wasn't it allowable to Cavaroc & Son, from the position of Schuchardt & Sons to them and they to Schuchardt & Sons, to have their account overdrawn at times?

(Objected to by Mr. Parsons and Mr. Hutchins as not calling for facts and as leading.)

A. Yes, sir.

Q. When Cavaroc & Son forwarded bills of exchange, &c., to F. Schuchardt & Sons did they wait to be advised of their realization before drawing for their amounts?

A. No, sir.

Q. Wasn't it the general course of their business under such circumstances to draw on Schuchardt & Sons as they, Cavaroc & Son, could dispose of their checks or bills without waiting for advices from Schuchardt & Sons?

A. Yes, sir.

WM. H. LEUPP.

Sworn to before me this 27th day of June, 1882.

HENRY C. BOWERS,
Notary Public, N. Y. Co.

114 U. S. Circuit Court.

FREDERIC DUMONT *et al. against* CHARLES M. FRY, Trustee, *et al.*

We hereby consent that the foregoing testimony of William H. Leupp be handed to the Honorable William J. Wallace as legal testimony in this case, notwithstanding the fact that the hearing herein has been had, to be considered by him in making his decision herein.

Dated New York, June 27, 1882.

PLATT & BOWERS,
Sol'rs for Def't Fry.
MAN & PARSONS,
Sol'rs for Def'ts Laforde and Reynes.
EDGAR A. HUTCHINS,
Compl'ts' Sol'r.

115 United States Circuit Court, Southern District of New York.

FREDERIC DUMONT *et al. vs.* CHARLES M. FRY, Trustee, *et al.*

WALLACE, *J.:*

Upon the proofs the complainants are the equitable owners of a moiety of the $275,000 of the negotiable bonds in suit, subject, however, to the lien of C. Cavaroc & Son for any balance existing in their favor in the account relating to the joint purchase of the bonds with the complainants.

As the legal title to the bonds was in Cavaroc & Son with nothing to indicate the equitable rights of the complainants, the bonds are subject also to the liens acquired upon by Schuchardt & Sons through their dealings with Cavaroc & Son. The present controversy mainly involves the question as to the character and extent of these liens.

During the period covered by the transactions in contro-
116 versy Schuchardt & Sons were bankers at the city of New York and were the correspondents and financial agents there of Cavaroc & Son, bankers, of New Orleans and also of the New Orleans National Banking Association, of the same city. At the same time the senior member of Cavaroc & Son was the president of the said banking association. The bonds in suit were intrusted by Cavaroc & Son to Schuchardt & Sons in September, 1870, for the convenience of the former and in order to facilitate the financial transactions between the parties. On various occasions Schuchardt & Sons obtained loans for Cavaroc & Son and for the banking association upon the security of the bonds. On one occasion Schuchardt & Sons loaned Cavaroc & Son $100,000 on the security of the bonds. While there is some evidence that the bonds were kept with Schuchardt & Sons merely as convenient depositories for Cavaroc & Son, the fact that they were so frequently hypothecated by the former for the financial transactions of the latter with their concurrence indicates quite satisfactorily that they were placed and kept by

Cavaroc & Son with Schuchardt & Sons as available securities for the financial exigencies arising from time to time between the parties. The bonds having thus been intrusted to Schuchardt & Sons, in the absence of any special understanding to the contrary, they acquired a banker's lien upon them, except as to those expressly hypothecated for the benefit of the banking association and as to which the more difficult question arises.

117 The New Orleans Banking Association dealt largely in foreign bills of exchange, which it negotiated through Schuchardt & Sons. By the course of business the amount of the foreign bills remitted from time to time by the banking association to Schuchardt & Sons was credited by the latter to the former, and the latter drew upon the former from time to time as funds were required by it. If, as sometimes happened, the bills which had been remitted and credited were not paid by the parties primarily liable upon them, they were charged back by Schuchardt & Sons to the banking association, monthly statements of account being rendered between the two banking concerns. It is in evidence that by the custom of business at New Orleans advances are made by bankers to shippers in anticipation of the actual delivery of the bills and accompanying documents, and the banking association was consequently necessitated to advance funds for that purpose before it could remit the bills and be credited by Schuchardt & Sons with their amount. In order to assist the banking association in this behalf, and undoubtedly for the mutual profit of both concerns, at times the banking association had been permitted by Schuchardt & Sons to draw in advance of remittances.

December 4, 1871, such an overdraft was authorized to the extent of $100,000 upon the condition that the drafts should represent exchange actually bought and paid for. The transactions between the two banking concerns were large, being sometimes over a mill-

118 ion of dollars daily.

These being the relations and course of business between the two concerns, a hypothecation of the bonds to Schuchardt & Sons was made by one of the Cavaroes for the benefit of the New Orleans Banking Association in February, 1873, and the important question in this controversy is concerning the true construction and meaning of that hypothecation. The hypothecation arises from the following correspondence conducted in the French language: February 6th, 1873, the cashier of the banking association wrote to Schuchardt & Sons: "Are we still authorized to draw *à déconvert* $100,000 against purchases of exchange advised by wire?" February 11th, 1873, Schuchardt & Sons replied: "The credit of $100,000 *à déconvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we supposed the agreement cancelled." February 15th, 1873, the cashier of the banking association answered: "Your letter of December 4, 1871, authorized us to draw in advance of remittance to the extent of $100,000, represented by purchases of exchange advised by telegraph. There was no mention of a deposit of city bonds to guarantee such overdraft, and we have been acting ever since under the impression that the credit was still in force.

We now note that it is cancelled, and beg leave to refer you to the private letter of our president upon the subject." On the same day C. Cavaroe, the president of the banking association, wrote
119 Schuchardt & Sons, referring to their letter of the 11th instant: "I authorize you to consider a portion of the bonds belonging to my firm which you have in your possession as collateral security *en cas de déconvert*." February 27, 1873, Schuchardt & Sons wrote to the cashier of the banking association: "In reply to your president's letter of the 15th instant we take pleasure in authorizing you, in accordance with the terms therein stated, to draw on us *à déconvert* for a sum not exceeding as maximum $100,000 against exchange purchases."

The New Orleans Banking Association failed on the 4th day of October, 1873, as did also Cavaroe & Son. At the time of the failure Schuchardt & Sons had $232,000 of the bonds in controversy in their possession, and there was due from the banking association to them $4,121.92 in excess of remittances, and there subsequently resulted by reason of the non-payment of drafts and bills which had been remitted by the banking association and credited to it, but charged back to its account because uncollectible, the sum of $195,315.63. Upon the account between Schuchardt & Sons and Cavaroe & Son a debt balance arose against Cavaroe & Son of $7,454.22. Subsequently Schuchardt & Sons failed.

It is now insisted by the defendant Fry, who is the trustee in bankruptcy of Schuchardt & Sons, that the bonds thus held by them are subject not only to a banker's lien for their benefit for the
120 indebtedness of Cavaroe & Son, but also to the extent of $100,000 were hypothecated under the terms of the correspondence referred to to secure Schuchardt & Sons for the payment of all advances made by them to the New Orleans National Banking Association. On the other hand, it is insisted by the complainants and by the assignees in bankruptcy of Cavaroe & Son that the hypothecation simply contemplated securing Schuchardt & Sons to the extent of $100,000 in advance of transmission to them of exchange, and to the extent that bills of exchange were transmitted the terms of the hypothecation were satisfied, although the exchange proved uncollectible.

Some obscurity exists as to the just interpretation of the agreement because the correspondence is in a foreign language, and the meaning of the term "*à déconvert*" is not entirely clear. On the one hand it is clear to mean "unsecured" and on the other to mean "uncovered."

But, reading the correspondence in the light of surrounding circumstances, it is not difficult to conclude that the hypothecation should be construed as intended to protect Schuchardt & Sons for any overdraft that might arise in the course of the transactions between the two banking concerns to the extent of $100,000. The bonds were evidently to be a continuing security until some new arrangement should be made. That they were to be security for an overdraft in the ordinary meaning of that term as used between bankers may be gathered from the correspondence. In his
121 letter of February 15th, the cashier of the banking associa-

tion indicates such to be his understanding and speaks of overdraft and drafts in advance of remittances as convertible terms. The correspondence also indicates clearly that the terms "*à déconvert*" and "overdraft" are synonymous. When the cashier asked permission to draw "*à déconvert*" and is answered by Schuchardt & Sons that the credit "*à déconvert*" was predicated upon the security of the bonds, the cashier replies that he had not understood the bonds were ever deposited to guarantee such "overdraft." Assuming that the language of the pledge is that the bonds were to be a security to the extent of $100,000 for any uncovered balance due from the banking association to Schuchardt & Sons that uncovered balance must be held to mean any existing overdraft which might from time to time arise. Whether at any time there was an overdraft could only be ascertained from the accounts of the parties. As it had been their custom to debit the banking association with all remittances uncollected, the amount of such uncollected remittances became a part of the general debit balance. The amount of the overdraft from time to time could not be ascertained except by ascertaining the general debit balance against the banking association, which depended to a greater or less extent upon the items charged back to it for uncollected exchange.

Cogent evidence of the understanding of the banking association and of C. Cavaroe himself that the bonds were pledged as security for an overdraft arising in part from uncollected remittances
122 is found in the resolution of the directors of the banking association adopted September 20th, 1873, Cavaroe himself being present, which is as follows:

"Resolved, That with a view of securing the president against any eventual loss for the 232 city of New Orleans bonds belonging to the firm of C. Cavaroe & Son, and actually pledged to S. Schuchardt & Sons as collateral security for the payment of all foreign exchange bills sent them for negotiation and by them endorsed, that he be, and is hereby, authorized to select as guarantee from the portfolios of the bank such papers as he may think proper, to the extent of $100,000."

This statement is entirely inconsistent with the theory that the uncovered balance which the bonds were intended to secure was anything more or less than an ordinary overdraft. In short, it is evident from the relations of the parties, their course of business, the correspondence between them, and the construction placed upon the transactions by Cavaroe himself, that the bonds were pledged to secure Schuchardt & Sons for any overdrafts of the banking association, to the extent of $100,000, which might from time to time arise. Such overdrafts were the credit "*à déconvert*" contemplated by the parties and constitute the unpaid balance of account due from the banking association to Schuchardt & Sons.

The conclusion is therefore reached that to the extent of $100,000 the defendant Fry, as trustee for Schuchardt & Sons, has a lien upon the bonds for the unpaid balance of the account of the New Orleans National Banking Association. In ascertaining this bal-
123 ance the sum on deposit with or collected by the Union Bank

of London is to be deducted, and, as the receiver of the Louisiana National Bank has not answered, it is to be adjudged that he has no interest in the fund arising therefrom.

The defendant Fry has also a lien upon the bonds to the amount of the balance of account due from Cavaroe & Son to Schuchardt & Sons. The bonds having been left by Cavaroe & Son with Schuchardt & Sons without any special agreement except the pledge of a portion of them for the New Orleans Banking Association, those not thus pledged are subject to the bankers' lien of Schuchardt & Sons.

The liens of Fry are first to be satisfied out of the interest of Cavaroe & Son in the bonds as between that firm and the complainants.

Fry has also a lien by virtue of his attachment upon the interest of the claimants for the sum which may ultimately be recovered in the suit against the complainants. Of course, Fry must account for the amount of all coupons collected.

It is understood from the statement of counsel that, the rights of the parties being adjudged, the extent of their respective interests can be arrived at without a reference to a master. Upon filing a stipulation a reference will therefore be dispensed with; otherwise a reference will be directed. Unless the parties otherwise stipulate,
the decree will provide for the appointment of a receiver to
124 sell the bonds and distribute the proceeds to the parties according to their respective rights. The defendant Fry is entitled to costs.

(Endorsed:) U. S. circuit court, so. dis. N. Y. F. Dumont *et al. vs.* Charles M. Fry *et al.* Opinion. Wallace, J. U. S. circuit court. Filed Sep. 6, 1882. Joseph M. Deuel, clerk.

125 United States Circuit Court, Southern District of New York.

FREDERICK DUMONT *et al. against* CHAS. M. FRY *et al.*

WALLACE, *J.:*

The question now raised upon the settlement of the decree was not suggested at the hearing of the cause or upon the briefs of counsel, doubtless upon the assumption that there would be no controversy in regard to it, the principal contention being disposed of.

It was decided that the hypothecation of the collaterals made by Cavaroe & Son to Schuchardt & Sons was upon the agreement that the bonds to the extent of $100,000 should be held by the latter as a continuing security for any overdraft or unpaid balance that might arise upon the account of the New Orleans National Banking Association with Schuchardt & Sons. The bonds were held by Schuchardt & Sons pursuant to the terms of the hypothecation until the suspension of the banking association when the latter went into liquidation. As was subsequently ascertained, the unpaid balance of the account due from the banking association to Schuchardt & Sons was the sum (adding interest) of $195,315.63.

126 The Comptroller of the Currency, pursuant to the provisions of the laws of Congress respecting national banking associations, proceeded to appoint a receiver of the New Orleans National Banking Association and to wind up its affairs. By S. 5236, U. S. Revised Statutes, the Comptroller is required to make a ratable dividend of the moneys arising from the assets of such associations upon all claims proved to his satisfaction. Fry, as trustee in bankruptcy of Schuchardt & Sons, proved their debt of $195,315.63 against the banking association to the satisfaction of the Comptroller. The Comptroller thereafter declared a dividend of fifty-five per cent. to the creditors of the banking association and paid to Fry such a dividend upon the claim proved by him. The question now is whether Fry can apply the whole payment thus received first to discharge the unsecured portion of the claim of Schuchardt & Sons against the banking association or whether he must apply it ratably upon that part secured by the collaterals as well as upon the part unsecured.

Obviously this is not the ordinary case where a creditor holding two demands against his debtor, one of which is secured and the other is not, may exercise his right to appropriate a payment in the absence of any application made by the debtor at the time. Nor is it the case where neither party having made application of a voluntary payment it devolves upon the court to make the just and equitable appropriation. The payment here was not made by the debtor,

127 and the case therefore is not controlled by the rule ordinarily governing the appropriation of payments made to creditors by debtors. The payment here was made by the law, the statutes of Congress which vested the Comptroller of the Currency with authority to distribute the assets of the banking association and which prescribed the mode of distribution. Neither the debtor nor the creditor could exercise the right to determine the application of the dividends. If the case turned merely upon the law of the appropriation of payments it would not be a doubtful one. The general rule is that where the payment is not a voluntary one, but is made under legal proceedings, it is to be appropriated to all the demands against the debtor ratably. (Blackstone *vs.* Hill, 10 Pick., 129; Commercial Bank *vs.* Cunningham, 24 Pick., 270.) And it would seem clear that as each dollar of the demand earned its ratable proportion of the sum realized from the assets of the debtor the sum earned by one portion of the demand could not be credited to the other, but should be applied ratably upon each dollar of the amount, whether secured or unsecured.

The question here depends not upon the law of the appropriation of payments but upon the effect of the agreement between the sureties and the creditors.

If Cavaroe & Son had become sureties for $100,000 of any advance that Schuchardt & Sons should make to the New Orleans Na-

128 tional Banking Association, and *the* Schuchardt had advanced $200,000, it would be plain upon authority that the dividend earned by the whole advance should be applied ratably. As between the surety and the creditor that would be a case where the

latter held two distinct demands, and a dividend arising from one of them could not be applied to the other without diverting it from its proper fund. But here the Cavaroes agreed with the Schuchardts that the latter might advance any sum they might see fit to the New Orleans National Banking Association, and that the Cavaroes' bonds to the extent of $100,000 should be security for any unpaid balance of the advances. The law can make no application of the payments received on account of the advances contrary to the agreement between the parties, and as it was agreed that the Cavaroes should be sureties to the extent of $100,000 for any unpaid balance arising between the primary parties, the general doctrines of the appropriation of payments cannot be invoked to defeat the agreement.

A careful reading of the English authorities supports this conclusion

The result is determined by the character of the undertaking of the surety in each case. *Ex parte* Hope, 3 M. D. & De G., 720; Midland Banking Co. *vs.* Chambers, 38 L. J. Chanc., 478. As is held in Ellis *vs.* Emanuel, 1 L. R. Exch. Div., 157, "It is a question of construction on which the court is to say whether the intention was to guarantee the whole debt with a limitation on the liability
129 of the surety or to guarantee a part of the debt only."

In Hobson *v.* Bass, 6 L. R. Ch. Ap., 792, the undertaking of the surety was construed as though it read: "I guarantee the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250." In Rushford *ex parte*, 10 Ves. Jr., 409, the same interpretation substantially was placed on the undertaking of the surety. In Paley *v.* Field, 12 Ves. Jr., 434, the engagement of the surety recited the intention of the parties to be that the bankers should not be indemnified by the surety for any loss which they should sustain by giving credit to the principal debtor beyond the sum of £1,500. The master of the rolls says: "The instrument marks distinctly that the sum for which the surety was to be answerable was, as against him, to be considered as the whole amount of the creditor's demand." Bardwell *vs.* Lydall, 5 M. & P., 327, is decided on the authority of Paley *v.* Field, but upon the facts cannot be reconciled with it, the guarantee being to secure a running balance of account.

In Raikes *v.* Todd, 8 Ad. & E., 846, and in Thornton *vs.* McKewan, I., H. & M., 525, the guarantee was to hold the plaintiff harmless for advancing a specified sum to the debtor from time to time as he might require.

In Gee *vs.* Pack, 33 L. J. (N. S.), 49, a note was pledged as security to repay an advance of £300 "now or hereafter to be made" on a banking account with a third person. Coburn, C. J., holds that the "document amounts to a promise to be liable for an
130 advance to the extent of £300," and "not a general promise to pay £300 on any balance, however arrived at, or that may remain due on a general advance to the principal."

In all these cases an advance was made in excess of the sum guaranteed, and upon the debtor's becoming insolvent the creditor received a dividend on the whole advance; and it was held that

the dividend was to be applied ratably on the secured and unsecured portion of the demand. They all proceed upon the distinction that the surety had guaranteed a limited part of a debt and not the unpaid balance of a debt, with a limitation as to the amount of liability, a distinction which seems subtle, but which rests on the supposed intention of the parties. In a guarantee of a limited part of a debt the parties to it do not contemplate, as between themselves, any augmentation of the debt. Whatever is paid, therefore, as a dividend arising from that part of the debt must be applied to discharge that portion. As between the surety and creditor, it is as though no other debt was held by the creditor against the debtor.

To apply the same rule when the guarantee contemplates the protection of the creditor against any ultimate balance that may arise upon the dealings between the debtor and creditor would be to ignore the intention of the parties to the guarantee.

The conclusion is therefore reached that the bonds of the Cavaroes having been pledged to secure any unpaid balance arising upon the account of the New Orleans Nat. Banking Ass'n to Schuchardt & Sons it is quite immaterial to the former how, when,
131 or by whom part of that balance has been paid, so long as $100,000 remains unpaid. If, however, the dividends reduce the balance below the amount of the pledge the sureties are to have the benefit of the reduction, because upon payment of the debt they would be subrogated to the creditors' lien upon the bonds.

(Endorsed:) U. S. circuit court, so. dist. N. Y. Frederic Dumont *et al. vs.* Chas. M. Fry *et al.* Opinion. Wallace, J. U. S. circuit court. Filed Nov. 10, 1882. Joseph M. Deuel, clerk.

132 United States Circuit Court, Second Circuit, Southern District of New York.

FREDERIC DUMONT *et al.*
against
CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

DEC. 6, 1882.

This action having been brought on for hearing on pleadings and proofs, Mr. Edgar A. Hutchins appearing as counsel for the complainants, Mr. James N. Platt for the defendant Fry, Mr. John E. Parsons for the assignees of Cavaroc & Son, the bill and amended bill of complaint having been taken as confessed against the Louisiana National Bank, after due service of process and proof of due service of notice of hearing on Mr. Charles E. Whitehead, solicitor for N. W. Casey, receiver, &c., being produced and filed,
133 it is adjudged that the firm of Frederick Schuchardt & Sons, at the date of their bankruptcy, were in possession of

the two hundred and thirty-two negotiable bonds of the city of New Orleans, which are the subject of this action, each for one thousand dollars, with interest coupons thereto attached, and that they were *bona fide* holders thereof under the following liens and hypothecation.

That the said firm of Frederick Schuchardt & Sons were, and had been for a number of years, the bankers and factors of the firm of Cavaroc & Son and of the New Orleans National Banking Association, and as such bankers and factors they received the said bonds from Cavaroc & Son, and said last-mentioned firm so deposited the same with Schuchardt & Sons.

It is further adjudged that at the time of said bankruptcy the said Cavaroc & Son were indebted to the said Frederick Schuchardt & Sons for a balance of their account with them, as such bankers and factors, and for which, with interest thereon from its date, said firm of Frederick Schuchardt & Sons had a lien on said bonds for their reimbursement, which still exists and to which said bonds are still subject.

It is further adjudged that the said Frederick Schuchardt & Sons at the time of their said bankruptcy also held the said bonds by virtue of a pledge or hypothecation by said Cavaroc & Son, which said last firm had power to create and which was binding on and enforceable against said bonds; that this pledge or hypothecation placed the said bonds as security to the said Frederick Schuchardt & Sons for any overdraft that had arisen in the course of the exchange transactions between the said firm of Frederick Schuchardt & Sons and the said New Orleans National Banking Association, to the extent of one hundred thousand dollars, and that the said
134 Frederick Schuchardt & Sons had a lien upon the said bonds for the unpaid balance of their account with the said New Orleans National Banking Association up to the amount of one hundred thousand dollars and interest from the date of said balance of account, and which was binding on and enforceable against said bonds.

That the said bonds and all the rights over and against and property in the same belonging to the said firm of Frederick Schuchardt & Sons, have, by virtue of their bankruptcy, vested in the defendant, Charles M. Fry, as trustee in bankruptcy, and that he is entitled to and has a right to enforce the same and receive the proceeds thereof.

It is further adjudged that said Fry, as such trustee, has received payment of various of the said coupons, and has received other payments on account of the aforesaid matters, and has also made payments and become subject to various changes about the said matters.

It is therefore ordered, adjudged, and decreed that it be referred to John A. Shields, a special master of this court, to take and state an account of what may be due at the date of this decree for principal and interest, as the balance of the aforesaid account of the said Cavaroc & Son with the said firm of Frederick Schuchardt & Sons, which said amount is hereby decreed to be a lien on and enforceable against and to be paid out of said bonds.

That he further take and state an account of what may be due at the date of this decree for principal and interest as the balance of the aforesaid account of the said National Banking Association of New Orleans with said firm of Schuchardt & Sons, and that he report what is the amount thereof at the date of this decree enforceable against and to be paid out of said bonds, and that in taking such two accounts he credit the said Charles M. Fry, as such trustee, with all proper charges and payments incurred or made by
135 him on account of the premises, and do charge him with the amount of said coupons collected by him and with all other moneys received by him on account of the premises; and, further, that in applying upon the said balance of account of the said New Orleans National Banking Association due to the said firm of Schuchardt and Sons the amount received from the said New Orleans National Banking Association the same be applied in the first place as a credit on said balance of account, and not *pro rata* on the part of said account secured by the said bonds; and that said master do report to this court with all convenient speed.

And it is further ordered that the said Charles M. Fry be paid his costs and disbursements out of the said moneys now in his hands, and that all further directions and dispositions be reserved until the coming in and confirmation of the said report.

(Signed) WM. J. WALLACE.

A copy.

[SEAL.] JOS. M. DEUEL, *Clerk.*

136 U. S. Circuit Court. In Equity.

FREDERICK DUMONT *et al.*
against
CHARLES M. FRY, Trustee, &c., *et al.*

Amended and supplemental account of Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons under decree of December 6th, 1882.

Amount due on account of the secured debt of New Orleans National Banking Association, as per Schedule A		$161,491 65
Amount due from Cavaroc & Son by reason of F. Schuchardt & Sons' banker's lien, as per Schedule B		25,763 49
Total amount due and secured by the bonds		$187,255 14
Deduct—		
Dividend on coupons collected by F. Schuchardt & Sons, as per Schedule C.	$20,784 15	
Coupons collected by me, as per Schedule D	67,556 91	
		88,341 06
Leaving a balance, for which the bonds are pledged as collateral, as of December 19th, 1882		$98,914 08

Schedule A contains a statement of the claim against the New Orleans National Banking Association.

Schedule B contains a statement of the claim against Cavaroc & Son.

Schedule C contains a statement of the account of coupons collected by F. Schuchardt & Sons.

Schedule D contains a statement of the account of coupons collected by Charles M. Fry.

Schedule E contains a statement of other matters affecting this action.

CHAS. M. FRY, *Trustee.*

137 SCHEDULE A.

Claim Against New Orleans National Banking Association.

1873.			
Oct. 4.	Claim against New Orleans National Banking Association proved before its receiver.		$195,315 63
	Of this amount bonds in suit were pledged to secure		$100,000 00
	Interest on the $100,000 to present date, as the dividends received from the receiver of New Orleans Nat'l Banking Ass'n never paid the unsecured balance.		
	Interest to January 1st, 1880, at 7%		43,691 65
	Interest from Jan. 1st, 1880, to Dec. 19th, 1882, at 6%		17,800 00
	Amount lien on the bonds and due Dec. 19th, 1882		161,491 65
	CHAS. M. FRY, *Trustee.*		
	The balance of above account was		$95,315 63
	Interest at 6% to April 18th, 1879		36,955 94
	Amount due April 18th, 1879		$132,271 57
1879.			
April 18.	Dividend received		97,657 82
	Balance due April 18, 1879		$34,613 75
	Interest to Jan. 1st, 1880, 6%	$1,702 89	
	Interest, Jan. 1st, 1880, to April 2d, 1880, 6%	528 30	
			2,231 19
	Total amount due April 2d, 1880		$36,844 94

1880.			
April 2.	Dividend received		9,765 78
	Balance due April 2d, 1880		$27,079 16
	Interest at 6% to Nov. 21st, 1882		4,283 00
	Amount due Nov. 21st, 1882		$31,362 16
1882.			
Nov. 21.	Dividend received		9,765 78
	Balance due Nov. 21st, 1882		$21,596 38

CHAS. M. FRY, *Trustee.*

138 SCHEDULE B.

Claim Against Cavaroc & Son.

Bankers' account.

1874.			
Jan. 12.	To balance as per account rendered		$7,454 22
	Interest at 6% to Dec. 6, 1882, 8 years 10 mos. 24 days		3,980 54
1875.			
Feb. 9.	To retainer and counsel fees in suit Louisiana Nat'l Bank *vs.* F. Schuchardt & Sons		250 00
	Interest at 6% to Dec. 6th, 1882, 7 years 9 mos. 27 days		117 38
1876.			
Feb. 19.	To taxable costs and disbursements up to this date in action Louisiana Nat'l Bank *vs.* Schuchardt	$97 79	
	Counsel fee for services therein	250 00	
			347 79
	Interest at 6% to Dec. 6, 1882, 6 years 9 mos. 17 days		141 84
1878.			
Nov. 27.	To costs, disbursements, and counsel fee in action Louisiana Nat'l Bank *vs.* Schuchardt		774 20
	Interest at 6% to Dec. 6, 1882, 4 years 9 days		186 96
1878.			
Dec. 28.	To judgment Louisiana Nat'l Bank suit, compromised at		9,500 00
	Interest at 6% to Dec. 6, 1882, 3 years 11 mos. 24 days		2,270 50

1879.			
Mar. 12.	To counsel, services on settling Louisiana Nat'l Bank suit		101 51
	Interest at 6% to Dec. 19, 1882, 3 years 9 mos. 7 days		22 06
	Additional interest		615 59
1882.			
Dec. 19.	Amount due		$25,763 49

CHAS. M. FRY, *Trustee.*

139 SCHEDULE C.

Account of Coupons Collected by F. Schuchardt & Sons.

Frederick Schuchardt & Sons before their failure collected and held under a separate account the following coupons:

1873.				
Dec. 1.	Coupons		$8,120 00	
1874.				
June 1.	Do.		8,120 00	
1875.				
May 21.	Do.	$8,120, less $\frac{5}{16}$ exchange	8,094 70	
			$24,334 70	
	Interest on above amounts to Feb. 19th, 1876, the date of adjudication as bankrupts of Schuchardt & Sons, is		2,657 70	
	Total claim against estate of F. Schuchardt & Sons		$26,992 40	
	The dividend paid by the estate of F. Schuchardt & Sons is 77%			$20,784 15

Mr. Fry charges himself with this.

CHAS. M. FRY, *Trustee.*

SCHEDULE D.

Account of Coupons Collected by Charles M. Fry.

The coupons due June 1st and Dec. 1st, 1875, are now in suit in New Orleans, amounting to	$16,240 00
The coupons from June 1st, 1876, to June 1st, 1882, are now in judgment in New Orleans, amounting to	105,560 00
Interest runs at 5% on the face value of the coupons.	
Mandamus to compel levying of tax to pay coupons from June 1st, 1876, to Dec. 1st, 1881, inclusive, with interest, has been granted (principal, $89,320).	
The tax levy for principal, interest, and costs was for	103,287 28
Of this there has been collected by the attorneys in New Orleans who sued on the coupons	77,853 77

140 They remitted in installments as follows:

1882.			
April 24		$20,000 00	
May 13		16,000 00	
June 12		14,000 00	
Aug. 15		10,000 00	
Dec. 12		5,000 00	
" 27		4,665 56	
			69,665 56
Deducted by Rouse & Grant, the attorneys employed in New Orleans, for their services in the various actions necessary to collect these coupons, in addition to their original retainer of $1,000			$8,188 01

The above amounts so remitted to Mr. Fry were subject to deductions for exchange, and the following is a statement of the net amount received by the said Fry.

The amounts as collected were deposited in the Bank of New York and interest allowed thereon at 2½%.

1882.			
April 24		$19,950 00	
May 23		15,960 00	
June 26		13,965 00	
Aug. 15		9,975 00	
Dec. 16		4,987 50	
" 27		4,653 90	
" 30, interest allowed by bank		675 51	
		$70,166 91	
Deduct—			
Paid Rouse & Grant, retainer	$1,000 00		
" " " on ac. disbursements	60 00		
" Platt & Bowers, their services in matter of collection of these coupons	1,250 00		
" vault rent, 1881, 1882, 1883	300 00		
		2,610 00	
Net amount collected by Chas. M. Fry			$67,556 91

CHAS. M. FRY, *Trustee.*

141 SCHEDULE E.

Statement of Other Matters Affecting this Action.

Balance remaining unpaid on account of judgment for which tax levy ordered, $25,433.71.

The coupons of Dec., 1881, and June, 1882, have been sued and are in judgment.

The coupons of Dec., 1882, are not yet sued.

It is expected that a further dividend of some small amount may be declared by the receiver of the New Orleans National Banking Association.

I also claim commissions on the amounts collected by me on the coupons.

I also claim to be allowed the fees of my counsel in sustaining my lien on these bonds, $2,000.

CHAS. M. FRY, *Trustee.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles M. Fry, being duly sworn, deposes and says that the preceding accounts are correct to the best of his knowledge and belief; that all moneys he has received on account of the matters therein referred to are therein credited and accounted for, and that neither he nor anybody for his use has received, to the best of his knowledge and belief, any moneys not therein credited.

CHAS. M. FRY.

Sworn to before me this 15th day of January, 1883.

[L. S.] THOMAS F. KEATING,
Notary Public, N. Y. Co.

142 *Compl'ts' Exceptions.*

U. S. Circuit Court.

FREDERIC DUMONT *et al. against* CHARLES M. FRY, Trustee, *et al.*

The complainants except as follows to the so-called amended and supplemental account of the defendant, Charles M. Fry, as trustee, filed under the decree of December 6th, 1882:

1st. To the charge in the account of the said claim of $195,315.63 or of any part thereof, or of any amount whatever as a lien upon the said bonds, complainants insisting that no part thereof constitutes a lien upon or claim against the said bonds.

2d. To any such charge for the additional and special reason that it appears by the so-called amended and supplemental account (Schedule C) that down to and subsequent to May 21st, 1875, Schuchardt & Sons, by a separate account, treated themselves as debtors for all collections from and proceeds of the said bonds, thus disclaiming

any lien upon or claim against them or right to apply the bonds or coupons or their proceeds or any part thereof upon account of the claimed indebtedness to them.

3rd. To the application by the defendant, Charles M. Fry, as trustee, to his credit of the several amounts received from the said bonds and their coupons, complainants insisting that the de-
143 fendant, Charles M. Fry, as trustee, is not entitled to any part thereof, but that he is chargeable for the same and for all further recoveries and receipts, with interest.

4th. To the said amended and supplemental account generally, in so far as it claims a lien upon the said bonds, their coupons, and their proceeds in excess of $100,000, complainants insisting that the defendant Fry, as trustee, has no lien upon the bonds or their coupons, and insisting further that by the said decree, which allows a lien, it is limited to $100,000.

5th. To the application by the defendant Fry, as trustee, to his credit of the whole amount of the several dividends paid by the receiver of the New Orleans National Banking Association, complainants insisting that if the defendant Fry, as trustee, has a lien or claim on the said bonds for $100,000 (which complainants dispute) he is only entitled to such portion of such dividends as is the proportion of $100,000 to $195,315.63, and is chargeable for the residue, with interest.

6th. To the omission by the defendant Fry, as trustee, to credit interest upon the several amounts credited on New Orleans judgments in coupon suits at a rate in excess of two and one-half per cent. or to credit the amounts as of the time when they were collected, complainants insisting that if the defendant Fry, as trustee, has any right to such collections (which he disputes) they must be accounted for as of the dates when they were received, with interest.

7th. To the omission by the defendant Fry, as trustee, to credit interest on the amounts received by Schuchardt & Sons from coupons after Feb. 19, 1876.

144 8th. To all charges for counsel charges, except as the same shall be supported by competent proof.

9th. To the charge for vault rent, except as the same shall be supported by competent proof.

10th. To the omission to credit in the account $10,500 and upwards, which the account shows to have been collected in excess of the amounts for which credit is given.

11th. To each and every amount charged in Schedule B against Cavaroc & Son, complainants maintaining that no part thereof is secured by the said bonds, and complainants now specially insisting that by the said so-called amended and supplemental account it appears that the said bonds were not treated by Schuchardt & Sons as pledged to secure any claim, but that, on the contrary, they debited themselves as debtors for amounts received from coupons.

12th. To the item of additional interest, $615.59, in Schedule B.

13th. To the whole of Schedule A and to the whole of the account relating to the claim mentioned in Schedule A, in so far as it assumes to charge any interest upon the said $100,000, complainants insist-

ing that there is no lien upon the said bonds at all and that the lien decreed is limited to $100,000. Complainants dispute that there is any such lien, and they except that by the account more than $100,000 is charged as due from the bonds, even with the addition of interest.

14th. To any charge for interest upon the said $100,000 in any event, complainants insisting that if there is a lien upon the
145 bonds for the last $100,000 of the Schuchardt claim no liability for interest can accrue till the claim matures.

15th. To the rate of interest at which the so-called amended and supplemental account is made up. The Louisiana rate of interest is 5 per cent. This defendant is informed and believes that the agreed rate of interest between Schuchardt & Sons and both the New Orleans National Banking Association and C. Cavaroc & Son was 5 per cent. or less.

16th. To any claim by the defendant Fry, as trustee, against the said bonds, their coupons, or any proceeds, upon the ground that the Schuchardt claims, both against the receiver of the New Orleans National Banking Association and the assignee of Cavaroc & Son, were proved as unsecured claims, and that any lien against the bonds was thereby waived and lost.

17th. To the credit of only 77 per cent. of the money received from coupons of said bonds in the hands of Schuchardt & Sons when they were adjudicated bankrupts, complainants insisting that this money never became merged in the general estate of the bankrupts and must be credited without reduction; and, further, that in fact 77 per cent. is not the entire amount of dividend paid and to be paid by that estate, but a much larger sum, which will finally amount to 100 per cent.

18th. To the $103,287.28 stated to be the amount of the tax levy. The amount should be much more.

19th. To all claims for commissions.

20th. To all claims for counsel fees.

146 21st. And complainants except further that any future dividends from the estate of the New Orleans National Banking Association or of C. Cavaroc & Son should be applied, with interest, in reduction of any legal claim of the defendant Fry, as trustee, against the said bonds so far as necessary, and that he should account for the residue and for future receipts from bonds and coupons and judgments on coupons, with interest.

EDGAR A. HUTCHINS,
Compl'ts' Sol'r.

Exceptions of Assignees of C. Cavaroc & Son.

U. S. Circuit Court. In Equity.

FREDERIC DUMONT *et al.*
against
CHARLES M. FRY, Trustee, &c., *et al.*

The defendant, E. H. Reynes, survivor of E. H. Reynes and Fran-

cois Laborde, now deceased, as assignees of C. Cavaroc & Son. except as follows to the so-called amended and supplemental account of Charles M. Fry, as trustee in bankruptcy of Schuchardt & Sons, under decree of December 6, 1882:

1. To the charge in the account of the said claim of $195,315.63 or of any part thereof, or of any amount whatever as a lien
147 upon the said bonds, this defendant insisting that no part thereof constitutes a lien upon or claim against the said bonds.

2. To any such charge for the additional and special reason that it appears by the so-called amended and supplemental account (Schedule C) that down to and subsequent to May 21, 1875, Schuchardt & Sons, by a separate account, treated themselves as debtors for all collections from and proceeds of the said bonds, thus disclaiming any lien upon or claim against them or right to apply the bonds or coupons or their proceeds or any part thereof upon account of the claimed indebtedness to them.

3. To the appropriation by the defendant, Charles M. Fry, as trustee, to his credit of the several amounts received from the said bonds and their coupons, this defendant insisting that the defendant, Charles M. Fry, as trustee, is not entitled to any part thereof, but that he is chargeable for the same and for all further recoveries and receipts, with interest.

4. To the said amended and supplemental account generally, in so far as it claims a lien upon the said bonds, their coupons, and their proceeds in excess of the sum of $100,000, this defendant insisting that Schuchardt & Sons have no lien upon the bonds or their coupons, and insisting further that by the said decree which allows a lien it is limited to $100,000.

5. To the appropriation by the defendant, Charles M. Fry, as trustee, to his credit of the whole amount of the several dividends paid by the receiver of the New Orleans National Banking Association, this defendant insisting that if the defendant, Charles M. Fry, as trustee, has a lien or claim on the said bonds for $100,000 (which this defendant disputes) he is only entitled to such part of the
148 said dividends as is the proportion of $100,000 to the said $195,315.63, and is chargeable for the residue, with interest.

6. To the omission by the defendant, Charles M. Fry, as trustee, to credit interest upon the several amounts collected on New Orleans judgments in coupon suits at a rate in excess of two and a half per cent. or to credit the amounts as of the time when they were collected, this defendant insisting that if the defendant, Charles M. Fry, as trustee, has any right to such collections (which he disputes) they must be accounted for as of the date that they were received, with interest.

7. To the omission by the defendant, Charles M. Fry, as trustee, to credit interest upon amounts received by Schuchardt & Sons from coupons after February 19, 1876.

8. To all charges for counsel charges, except as the same shall be supported by competent proof.

9. To the charge for vault rent, except as the same shall be supported by competent proof.

10. To the omission to credit in the account $10,500 and upwards, which the account shows to have been collected in excess of the amounts for which credit is given.

11. To each and every amount charged in Schedule B of claim against Cavaroc & Son, this defendant maintaining that no part thereof is secured by the said bonds, and this defendant now specially insisting that by the said so-called amended and supplemental account it appears that the said bonds were not treated by Schuchardt & Sons as pledged to secure any claim, but that, on the
149 contrary, they debited themselves as debtors for amounts received from coupons.

12. To the item of additional interest, $615.59, in Schedule B.

13. To the whole of Schedule A and to the whole of the account relating to the claim mentioned in Schedule A, in so far as it assumes to charge any interest upon the said $100,000, this defendant insisting that there is no lien upon the said bonds at all and that the lien decreed is limited to $100,000. This defendant disputes that there is any such lien, and he excepts that by the account more than $100,000 is charged as due from the bonds, even with the addition of interest.

14. To any charge for interest upon the said $100,000 in any event, this defendant claiming that if there is a lien upon the bonds for the last $100,000 of the Schuchardt claim no liability for interest can accrue until the claim matures.

15. To the rate of interest at which the so-called amended and supplemental account is made up. The Louisiana rate of interest is 5 per cent. This defendant is informed and believes that the agreed rate of interest between Schuchardt & Sons and both the New Orleans National Banking Association and C. Cavaroc & Son was 5 per cent. or less.

16. To any claim by the said Charles M. Fry, as trustee, against the said bonds, their coupons, or any proceeds, upon the ground that the Schuchardt claim, both against the receiver of the New Orleans National Banking Association and the assignee of
150 Cavaroc & Son, was proved as an unsecured claim, and that any lien against the bonds was thereby waived and lost.

17. To the credit of only 77 per cent. of the money received from coupons of said bonds in the hands of Schuchardt & Sons when they were adjudicated bankrupts, this defendant insisting that this money never became merged in the general estate of the bankrupts and must be credited without reduction; and, further, that in fact 77 per cent. is not the entire amount of dividend paid and to be paid by that estate, but a much larger sum, which will finally amount to 100 per cent.

18. To the $103,287.28 stated to be the amount of the tax levy. The amount should be much more.

19. To all claim for commissions.

20. To all claim for counsel fees.

21. And this defendant excepts further that any future dividends from the estate of the New Orleans National Banking Association or of C. Cavaroc & Son should be applied, with interest, in reduction

of any legal claim of the defendant, Charles M. Fry, as trustee, against the said bonds so far as necessary, and that he should account for the residue and for future receipts from bonds and coupons and judgments on coupons, with interest.

January 20th, 1883.

MAN & PARSONS,
Att'ys for said Defendant, 56 Wall Street, New York.

151 Counsel for Fry, trustee, takes the testimony of WM. H. LEUPP, who, being duly sworn, deposes as follows:

I reside in New Brunswick, N. J. I have been employed as clerk by Mr. Charles M. Fry since his appointment as trustee in bankruptcy for Fred'k Schuchardt & Sons, and have kept the books of the estate and generally attended to its management. I am familiar with all the details of the estate. Before Mr. Fry's appointment I was in the employ of Fred'k Schuchardt & Sons as cashier and head clerk, and familiar with all their business in a general way. I knew of the details of their account with the New Orleans National Banking Association, and made up the statement of that account which was allowed by the receiver of the New Orleans National Banking Association.

Q. To what date did you compute interest on the items of that account?

A. October 4th, 1873.

Q. At what amount was the account allowed by the receiver?

A. The account was allowed by the receiver on April 8th, 1879, at a currency balance of $180,624.58, and a gold balance of $14,691.05, making a total of $195,315.63.

Q. Was any interest allowed in that account on any of the items forming it after October 4th, 1873?

A. None that I am aware of.

Q. Why not?

Objected to, that the witness cannot state what were motives of the receiver.

A. Our New Orleans agent instructed us——

Counsel for the other parties object to the witness stating the instructions on the ground that they are hearsay.

(Witness continues:)

That no interest should be charged on the account after that date.

152 Q. Why?

Objected to as before.

A. That being the date of the bank's failure.

Q. What was the currency account actually due to F. Schuchardt & Sons from the New Orleans National Banking Association on October 4th, 1873, as shown at that time by the books of Schuchardt & Sons?

A. The currency account was $4,125.13.

Q. What was the amount actually due at that time, as shown by the bills of exchange that came back protested and were taken up by Schuchardt & Sons?

WILLIAM H. LEUPP further examined:

1 Q. You stated at the last examination that the actual balance of the currency account at Oct. 4, 1873, was $4,125.13?

A. Yes, sir.

2 Q. Have you made up and stated and do you present here a continuation of that currency account between F. Schuchardt & Sons and the New Orleans National Banking Association?

A. Yes, sir.

Mr. Parsons here appears.

3 Q. At what rate of interest have you made the computations?

A. At 7 per cent. to Jan. 1, 1880, and 6 per cent. from that date to Dec. 19, 1882.

Counsel for defendant Fry offers the account referred to in evidence, and the same is marked Defendants' Exhibit A, March 29, 1883., J. A. S., master.

4 Q. Please explain the apparent difference between that account and the account admitted by the receiver of the New Orleans National Bank?

A. There was no interest allowed by the receiver after Oct. 4, 1873, and in the account I present interest was charged to December 19, 1882.

5 Q. I don't mean difference in that particular, but why does the account appear as of Oct. 4, 1873, as only $4,125.13? What
153 led to the additions after that date, considering that the bank then failed?

A. It was due to the return of protested bills of exchange and other matters shown in the account just offered as compared with the proof of debt attached to the commission.

6 Q. Have you made up a statement of the account of Cavaroc & Son with F. Schuchardt & Sons?

A. Yes, sir.

7 Q. Computed at what rate of interest?

A. Seven and six, as before.

The account referred to offered in evidence by counsel for defendant Fry, and the same is marked Defendants' Exhibit B, March 29, 1883, J. A. S., master.

8 Q. Have you paid out the amounts charged for rent of safe for the deposit of these bonds—I mean the amount charged in Mr. Fry's account as filed?

A. Yes, sir.

9 Q. The amount was how much?

A. $300.

10 Q. Have you paid the amounts charged in that account to Platt & Bowers for legal services—I mean the amended and supplemental account filed by Fry, trustee, and what was the amount; also the sums of $1,000 and $60 to Rouse and Grant?

A. Yes; the $1,250 charged as paid to Platt & Bowers and the $1,000 and the $60 charged as paid to Rouse & Grant—that is, as clerk for Mr. Fry I paid them.

11 Q. Are the amounts stated in such amended and supplemental account as having been collected by Fry, trustee, on account of the coupons on the bonds in suit correctly stated?

A. Yes, sir.

12 Q. Did Mr. Fry pay to Platt & Bowers for their services in this action, sustaining his lien on the bonds in suit, &c., the $2,000 as claimed in the amended and supplemental account, Schedule E?

Objected to by Mr. Hutchins as immaterial.

A. Yes, sir; it was paid on or about Jan. 15, 1883.

154 Cross-examination by Mr. HUTCHINS:

13 X Q. Please look at the second page of the account filed by you to-day, the item of $159,413.70, and state what that amount would have been if you had made the whole computation at 6 per cent.

A. It would have been $153,539.73.

14 X Q. What would it have been had you computed at 5 per cent.?

A. $145,539.70.

15 X Q. In the transactions between C. Cavaroc & Son and F. Schuchardt & Sons, at what rate was interest charged or allowed?

A. At 4 per cent.

16 X Q. Where was the vault, the rent of which you speak of as having been paid by you?

A. In the Bank of New York.

17 X Q. Who was the president of that bank?

A. Charles M. Fry, who is the defendant, as trustee, in this case.

18 X Q. Does the account which you have produced to-day and about which you have been examined by Mr. Bowers show correctly the charges paid by F. Schuchardt & Sons or charged to them on the protested drafts?

A. Yes, sir.

19 X Q. Did they actually pay the charges?

A. Yes, sir.

Redirect:

20 R. D. Q. Why have you charged interest at 7 per cent. and 6 per cent. on the Cavaroc account if 4 per cent. was the interest charged and allowed in the transactions between the parties?

Objected to by Mr. Parsons, that it is immaterial what led the witness to do so.

A. Because I was so instructed.

21 R. D. Q. Was the balance a Dr. or Cr. balance previous to the account you have produced here?

A. I can't tell without looking at the books; sometimes Dr. and sometimes Cr.

22 R. D. Q. Was the 4 per cent. charged by agreement?

A. I presume it was.

155 23 R. D. Q. When did transactions between the parties cease?

A. At the date of the failure, Oct. 4, 1873. Outstanding matters were settled afterwards, but there were no new transactions.

Mr. CHARLES M. FRY, being called on behalf of defendant and duly sworn, deposes as follows:

(Oath taken before a notary public by consent.)

1 Q. You are the defendant in this action?

A. Yes.

2 Q. And the party who filed the account and also signed the same on which this proceeding is based; also the party who signed and verified, on January 15th, 1883, the amended and supplemental account which was filed?

A. Yes.

3 Q. Does Schedule D of that account contain a correct statement of the amounts remitted to you as proceeds of coupons sued and collected in New Orleans?

A. Yes; that is the account.

4 Q. Where did you deposit the remittances as received?

A. In the Bank of New York.

5 Q. Witness shown pass-book and asked what it contains?

A. It contains the account of money received from Rouse & Grant, of New Orleans, for coupons collected by them, after deducting their charges and exchange.

6 Q. What rate of interest was allowed by the Bank of New York on such deposits, and is it shown in the account?

A. 2½ per cent. interest, and it is shown in the account.

7 Q. Is that interest accounted for in the account filed in the item 1882, December 30th, interest allowed by bank?

A. Yes, sir; it is $675.51.

Book marked Exhibit A, March 31, 1883, J. A. S., master.

156 8 Q. Since that account was balanced you have checked against it for part of the expenses charged against that fund, have you not?

A. Yes, sir; to the extent of $1,300.

9 Q. At the time of your appointment as trustee in bankruptcy of F. Schuchardt & Sons, what, if any, account did you find of coupons that had been collected by them on the bonds in suit in this action?

A. There was a sum of money amounting — $24,331.70, coupons

collected as per Schedule C of the amended and supplemental account.

10 Q. What disposition, if any, did you made of that matter?

A. That amount of money was kept in the Bank of New York; interest allowed at 2½ per cent.

11 Q. For what purpose did you so keep that money?

A. It has been kept pending the disposition of this suit.

12 Q. Have you an account made up by the Bank of New York, showing such deposit and the interest?

A. Yes, sir.

13 Q. At what date did you deposit this $24,331.70?

A. By referring to the account I could tell.

Counsel for Mr. Fry hands the witness the account. The opposing counsel object, that the paper called an account shows that it has been recently made up; that it is not an original paper, and they object to its use.

14 Q. Can you, by refreshing your recollection by looking at the paper I hold in my hand, fix such date?

A. I take it for granted I could.

15 Q. From what source did you receive this paper?

A. It was furnished by the cashier of the bank.

16 Q. Please to look at the paper and state at what date the deposit was made.

A. According to the paper, it seems to have been made April 18th, 1876, and interest computed to date.

17 Q. Was that exact amount deposited?

A. That exact amount was deposited in connection with other money belonging to the estate.

157 18 Q. Did it form part of the first funds you received belonging to the estate?

A. Yes; it did.

19 Q. Is there any entry that was made with your knowledge or by your direction concerning this particular amount at or about the time of the deposit?

A. Mr. Leupp, the clerk, made an entry on his books referring to this special fund or money.

20 Q. Is this the entry?

A. Yes.

Entry referred to offered. Objected to on the ground that the so-called entry is on a slip of paper pinned to the book and no part of the entry of the deposit. Marked Exh. C, March 31, 1883, J. A. S., master.

21 Q. Has that particular amount been reserved by you ever since on deposit in the Bank of New York to await the termination of this action?

A. It has; yes.

22 Q. What does the interest amount to which has been allowed on this particular fund by the Bank of New York?

A. $4,228.55, making a total of $28,563.25.

23 Q. Have you that amount now on deposit to your credit in the Bank of New York to abide any order that may be made in this action?

A. I have.

24 Q. When was the account that you have referred to rendered to you by the bank?

A. To-day, March 31, 1883.

Account referred to offered in evidence and marked Exhibit B, March 31, 1883, J. A. S., master.

24½ Q. Was that entry, Exhibit C of this date, made at the time of the deposit of April 18, 1876, and intended to refer to the amount then deposited by you as the first moneys received in your trust?

A. I believe it did so refer and was made at the time stated.

25 Q. When you received or found among the assets of F.
158 Schuchardt & Sons the bonds which are the subject-matter of this suit were there unpaid coupons on them?

A. Yes.

26 Q. Has the city ever voluntarily paid any of the coupons since you came into possession of these bonds?

A. No.

27 Q. Were you requested a year or two since by Mr. Dumont, one of the parties to this action, or by his counsel to institute proceedings to collect the unpaid coupons on these bonds?

A. I was recommended by counsel to do so. I was called upon by some one about it and then saw my counsel, Mr. Platt, and advised to do it.

28 Q. And you then did it?

A. I did.

29 Q. And retained Rouse & Grant, of New Orleans, in the matter?

A. I did.

30 Q. The amended and supplemental account contains a statement of the results of these proceedings, does it not?

A. Yes, sir.

CHARLES M. FRY.

Sworn to before me this 31st day of March, 1883.

[SEAL.] THOMAS F. KEATING,
Notary Public, N. Y. Co.

Further examination of the witness, WILLIAM H. LEUPP:

1 Q. Have you any explanation to give concerning your statement, made at the hearing March 29, that the rate of interest charged in the transactions between C. Cavaroc & Son and F. Schuchardt & Sons was 4 per cent.?

A. Yes, sir; I find that the rate of interest charged was 7 per cent. and allowed was 4 per cent.—that is, 7 per cent. was charged when Cavaroc & Son owed Schuchardt & Sons and 4 per cent. was allowed when Schuchardt & Sons owed Cavaroc & Son.

159 2 Q. (Witness shown Exhibit C of March 31, 1883.) In whose handwriting is that?

A. Mine.

3 Q. Please state when it was made and where it was made.

A. It was made April 18, 1876, in the office of Mr. Fry.

4 Q. What led to its being made?

Objected to by Mr. Hutchins as immaterial and irrelevant.

A. Because it was the proceeds of New Orleans city coupons collected by Schuchardt & Sons from bonds in this suit, and did not belong to the funds of Frederick Schuchardt & Sons, and were to be held to be accounted for to whoever would be adjudged to be the owners of the bonds.

Mr. Hutchins moves to strike out the answer as irresponsive.

5 Q. Was any conversation had between you and Mr. Fry upon the subject?

A. Yes, sir.

6 Q. Please give it.

Objected to by Mr. Hutchins and Mr. Parsons as immaterial and irrelevant.

A. I told him that amount had to be reserved in any arrangements to pay dividends.

7 Q. Why did you tell him that?

Objected to as immaterial.

A. I gave Mr. Fry the history of that transaction. He agreed with me and said the amount should be kept separate.

8 Q. In what book was that entry made?

Objected to that it appears by inspection that it was not an entry made in any book, but was a loose slip of paper pinned on a blank sheet of a book which still remains blank.

A. In the check book produced by Mr. Fry, upon his examination in this case, March 31, 1883, being the check book of Mr. Fry, as trustee, it was pinned in the book at the opening of the account, April, 1876.

160 9 Q. Was it pinned in at the time that you entered the first deposit to the credit of Mr. Fry, as trustee?

A. Yes, sir; when the account as assignee was opened; he first acted as assignee and then as trustee.

Two leaves of said book are offered in evidence and marked Defendants' Exhibit A, April 11, 1883, J. A. S., master.

10 Q. What dividend has been paid by Mr. Fry, as trustee in bankruptcy of F. Schuchardt & Sons?

A. Seventy-seven per cent.

Cross-examined:

11 X Q. Has Mr. Fry made a final dividend?

A. No, sir.

12 X Q. What further dividend is anticipated?

A. I think 2½ per cent. to 5 per cent. The amount of further dividends depends upon what shall be realized from large tracts of land and other similar assets of which it is impossible now to fix the value or whose price cannot now be estimated, so that I cannot tell what further dividend will be received.

13 X Q. When you have paid these successive dividends have you paid the appropriate dividends on this $24,334.70 coupon money to any one? In other words, did you consider that as representing a creditor sum on which dividends should be paid?

A. No, sir.

14 X Q. When you searched for means to make the explanation made by you at the opening of to-day's examination in regard to the rate of interest in the accounts of C. Cavaroc & Son from what did you obtain that information?

A. I asked the book-keeper who kept the accounts at that date, and I also looked in the books.

15 X Q. Was the information you received from the books sufficient to give the information for that explanation without
161 the conversation with the book-keeper?

A. Yes, sir; but I asked him for greater certainty.

16 X Q. Look at Exhibit B, annexed to the deposition of Charles Cavaroc, Sr., Nov. 4, 1881, printed in this case as a part of complainants' proofs, and state whether or not in that account 4 per cent. interest was charged against Cavaroc & Sons in an account which resulted in a balance owed to Schuchardt & Sons.

A. It was not.

The account referred to is offered in evidence and marked Compl'ts' Exhibit B, Ap'l 11, 1881, J. A. S.

17 X Q. Is that exhibit a statement of an account current sent by F. Schuchardt & Sons to Cavaroc & Son in the ordinary course of business?

A. Yes.

18 X Q. And does it form the basis of the claim now made by the defendant Fry, as referred to in Schedule B of his amended and supplemental account, of which the first item is the amount stated by this exhibit to be the balance?

A. Yes, sir.

19 X Q. And have you compared that exhibit with the original and found it to be correct?

A. Yes, sir.

WM. H. LEUPP.

Sworn before me—

JOHN A. SHIELDS, *Master.*

WILLIAM H. LEUPP—examination continued April 30, 1883.

By Mr. PARSONS:

Q. What date do you fix for the deposit in the Bank of New York of the $24,334.70?

A. April 18, 1876.

Q. Did you keep a deposit book with the bank?

A. Yes, sir.

162 Q. How was that deposit entered in the deposit book?

A. It reads——

Q. Is the deposit entered in the check book?

A. Not by itself.

Q. Do you know what an entry in a book is?

A. Yes, sir.

Q. If there is any entry in the check book of the deposit of that $24,334 70 please to read it.

A. I cannot read it.

Q. For the reason that there is no such entry?

A. No, sir; because it is included in another.

Q. Did F. Schuchardt & Son ever keep that $24,334.70 separate from their other moneys?

A. No, sir.

Q. Did Mr. Fry ever separate the $24,334.70 from any other moneys?

A. Yes, sir.

Q. Were you present when he made the separation?

A. No, sir. I was present when he said he would arrange to make it.

Q. Did he, to your knowledge, ever make any actual separation of the $24,334.70 from other moneys?

A. Yes, sir.

Q. Were you present when it was done?

A. No, sir.

Q. Are you not, then, mistaken in saying that he ever did to your knowledge?

A. No; I do know that it was done.

Q. When?

A. A day or two before March 31, 1883.

Q. Was not the $73,852.86 deposited April 18, 1876, checked against by Mr. Fry generally?

A. Yes, sir.

Q. Within how short a time after April 18, 1876, did the checks amount to as much as the $73,852.86?

A. I could not say, because we deposited the same day $131,186.58.

Q. How soon did the checks against the account amount to as much as $205,000.

A. ——.

163 Q. When and by whom was fixed the 2½ per cent. interest mentioned in Exhibit B, March 31, 1883?

A. I think it was fixed by Mr. Fry two or three days before his examination, March 31, 1883.

Q. Did the general bank account of Mr. Fry, trustee, with the Bank of New York draw interest?

A. No, sir.

Redirect by Mr. BOWERS:

Q. Did that $24,334.70 remain at all times on deposit in the Bank of New York?

Objected to upon the ground that the witness has stated that there never was any such deposit separated from other moneys until March, 1883.

A. Yes, sir.

Q. Please explain the matter more fully.

A. I made a loose memorandum entry in the check book, reserving this $24,334.70 as not to be used in the payment of Schuchardt & Sons' dividends, and it was so reserved; and I reported to Mr. Fry and the committee of the creditors that the amount was to be held reserved, and this amount was so held in the payments that were made, and the balance exceeded this sum at all times until it was drawn out, in March last.

WM. H. LEUPP.

Sworn to before me this 30th day of April, 1883.

[SEAL.] JULIUS H. SEYMOUR,

Notary Public (*No.* 128), *City and County of New York.*

164 United States Circuit Court, Southern District of New York.

FREDERIC DUMONT *et al.*

against

CHARLES M. FRY, Impleaded with CAVAROC *et al.*

JAMES N. PLATT, being called as a witness for Charles M. Fry, testified as follows:

I am an attorney and counsellor-at-law and member of the firm of Platt & Bowers. I am one of the attorneys for the defendant, Charles M. Fry, in this action. I had the charge of the action and tried the same. I drew the cross-interrogatories on the commission issued on behalf of the complainants. I personally took the proofs in the case and supervised their preparation for the court. I also attended on the testimony taken by the other parties, and had the exclusive care of the preparation of the case until brought on for argument before his honor Judge Wallace. I attended on the argument and tried the case myself. I also prepared the brief submitted. I also prepared for argument the questions that arose on the settlement of the form of the decree on the directions to the master for the applications of the payments received on account of the debt in controversy, the object being to have the application substantially first made on that part of the debt not secured by the bonds in suit, and I prepared the brief submitted on this question.

Besides myself I was associated with Mr. Bowers, both at
165 the hearing and at the argument which took place on the settlement of the decree. The bonds in controversy con-

sisted of two hundred and thirty-two thousand dollars of bonds of the city of New Orleans. The lien established in favor of the defendant Fry is about one hundred and eighty-seven thousand dollars.

For the services of myself and my firm in this matter we charged and have been paid two thousand dollars. I consider this a very reasonable and a very proper charge, and if I had supposed there would be any objection or litigation over this amount I think I would have charged what I really was entitled to, uninfluenced by any feeling or desire to appear well to my client or the other parties interested, and have relied upon my strict legal rights, which I consider would have been a proper percentage on so large an amount ably and vigorously contested.

I was also retained by Mr. Fry to advise him on the request made by plaintiffs' counsel to institute proceedings in New Orleans to collect the unpaid coupons on these bonds.

Mr. Hutchins first approached me on the subject, and I then was obliged to consult with Mr. Fry on the matter. This occasioned a number of consultations and discussions on the subject, and it seemed to be involving myself and my client in another long and tedious litigation about these bonds. However, as it was for the interest of those ultimately interested in the bonds, and I considered that under the present ideas of Mr. Fry's relations he was bound to do all he reasonably could to lessen the loss that the other parties might endure, even at any trouble and labor, I could not help getting him and myself into this new litigation, and accordingly prepared his case and retained the counsel in New Orleans, whom I thought best qualified to carry the matter through.

166 Accordingly I did all that was necessary in writing and correspondence, and also by personal interviews with Mr. Rouse, of the firm of Rouse & Grant, of New Orleans, who were the counsel retained there to prosecute these coupons to judgment. The proceedings have already resulted in the collection of seventy-seven thousand eight hundred and fifty-three $\frac{77}{100}$ dollars, less the charges of the counsel at New Orleans, as proved by the commission issued on this proceeding.

Our services in this matter still continue. I charged Mr. Fry and have been paid by him for my services and those of my firm in this matter up to the time of the entry of the interlocutory judgment in this action twelve hundred and fifty dollars. This I consider a proper charge.

J. N. PLATT.

Sworn to before me this 14th day of April, 1883.

THOMAS F. KEATING,
Notary Public, N. Y. Co.

167 EXHIBIT "A." April 11, 1883. J. A. S., Master.

Chas. M. Fry, assignee.

1876.				
April 18.	Ac. Fred'k Schuchardt & Sons			$73,852 86
"	Ac. Fred'k Schuchardt's individual estate			131,186 58
563.72. 22.	Ac. Fred'k Schuchardt's individual estate			
	Final dividend on U. S. & Mexican Telegraph Co. stock			35 39
	Interest received by U. S. marshal from Union Trust Co. on deposit			528 33
				$205,603 16
May 1.	Ac. Fred'k Schuchardt's individual estate:			
	Of John Boyle, 3 mos. rent of No. 203 Fulton St.	$875 00		
	Less bill of R. E. & W. T. Pertson	$30 73		
	Less bill of Johnson Bros.	15 50		
			46 23	
				828 77
				$206,431 93
3.	Ac. Fred'k Schuchardt & Sons:			
	Rec'd for $3,935 Orient Mut'l Insurance Co. scrip of 1860	$3,935 00		
	Rec'd for 6% int. on $13,240 in name of F. S. & Sons	794 40		
	Rec'd for 6% int. on $17,495 in name of L. Wells	1,049 70		
				5,779 10
	Rec'd 6 mos. int. on $1,000 Memphis & Charleston bonds, due 1st Nov., '75			70 00
	Rec'd 6 mos. int. on $1,000 Memphis & Charleston bonds, due 1st May, '76			
	Rec'd 6 mos. int. on $1,000 Muscatine city bonds. due 1st Ap'l, '76			30 00
				$212,311 03

168 $24,334.70, proceeds of collected coupons from N. O. city bonds claimed by F. Dumont & Co., C. Cavaroc & Son, and held as collateral for balance due by C. Cavaroc & Sons.

" Bank of N. O. Nat'l Build'g Asso'n.

" F. Dumont & Co.

This item must be held in trust and not included in dividend fund.

Exhibit C, J. A. S., master.

(Endorsed:) "U. S. circuit court. Filed Oct. 13, 1880. Timothy Griffith, clerk."

169

	1876. Fred'k Schuchardt, individual estate			$212,311 03
6,104.10.	May 3. 6 mos. int. on $5,000 Ohio & Miss. R'way Co. bonds, due 1 May			175 00
	R. J. Wilkinson, ac. of rent of 71 Grand and 28½ Wooster St., due 1 April, 1876			50 00
				$212,536 03
9,206.09.	4. Fred'k Schuchardt & Sons, rec'd of Lesesue & Wells, in full of their ½ interest in j't stock ac. (after sale of 70 sh's Charleston Nat'l Build'g Asso'n stock)	$8,982 34		
	" Balance due, less $300 legal charges on sale of 25 sh's Charleston Hydraulic Cotton Press Co. stock	223 75		
				9,206 09
				$221,742 12
.78.	5. Fred'k Schuchardt & Sons, 2½% div'd on 26 Dubuque & Sioux City R. R. Co. stock			78 00
				$221,820 12
1,561.89.	6. Of U. S. marshal, ac. of settlement of moneys in his hands			1,561 89
				$223,382 01
110,000.	11. Of A. H. Müller & Son, ac. proceeds of auction sale of stocks			110,000 00
				$333,382 01
7,267.67.	12. " balance			7,106 17
				$340,488 18

170 EXHIBIT "B." March 31, 1883. J. A. S., Master. Chas. M. Fry, Trustee in Bankruptcy.

Special Account of F. Schuchardt & Sons in Account with the Bank of New York.

DR.	National Banking Association.	CR.
1876.		
April 18.	Cash	$24,334 70
	Interest to date, 6 yrs. 347 days, @ 2½%	4,228 55
	Balance	$28,563 25

N. Y., M'ch 31, '83.

(Endorsed:) "U. S. circuit court. Filed Oct. 13, 1880. Timothy Griffith, clerk."

EXHIBIT "B." Annexed to Deposition of Charles Cavaroc, Sen., Nov. 4, 1881.

Messrs. C. Cavaroc & Son, in Acc't with Chuchardt & Sons.

J. D. Rouse, Com'r, DR.

1873.					
July 1	To balance	$138,650 38	30 June	192	266,208 00
5	draft No. 2,621	12,000 00	5 July	187	22,440 00
14	2,660, 2,677	55,500 00	14 "	178	98,790 00
15	2,678-79	45,000 00	15 "	177	79,650 00
19	2,714	15,000 00	19 "	173	25,950 00
21	2,718	28,000 00	21 "	171	47,880 00
28	2,743-44	45,000 00	28 "	164	73,800 00
August 9	2,785-87	60,000 00	9 Aug.	153	91,800 00
19	2,885-2,891	182,000 00	19 "	143	260,260 00
20	2,900, 2,918-19	144,000 00	20 "	142	204,480 00
25	2,944-45	35,000 00	25 "	137	47,950 00
29	2,963	10,000 00	29 "	133	13,300 00
30	cash paid C. Cavaroc, Jun.	300 00	30 "	132	396 00
Sept. 2	draft No. 3,006	43,000 00	2 Sept.	130	55,900 00
3	3,019-21	30,000 00	3 "	129	38,700 00
6	3,041	83,000 00	6 "	126	104,580 00
8	3,090-91	68,175 23	8 "	124	84,537 00
1874.					
January 5	Protested drafts on F. Dumont & Co. for 100,000 and charges	21,938 62	5 Jan.		1,536 00
12	Protested drafts on F. Dumont & Co. for 100,000 and charges	22,026 07	12 "		
	Protested drafts on Maxquelier Fils for 30,000 and	6,562 23	12 "		
	Postages, letters, &c.	6 30	13th of Nov.		23,811 00
		$1,045,158 83			1,541,968 00
Jan. 12	To balance	7,454 22	12 Dec.		

1873.								
July	2	By remittance	Frs. 425,000	$92,070 92	2 July	190	1,173 00
			200,000	43,727 23	2 "	190	258,317 00
	5		57,000	12,346 77	5 "	187	23,087 00
		50 N. O. c'y coupons		1,745 62	1 "	191	3,335 00
	11	Remittance on N. York		14,671 01	11 "	181	26,554 00
	16	"	400,000	87,955 14	16 "	176	154,801 00
	19	"	70,000	15,322 04	19 "	173	26,507 00
	23	"	130,000	28,369 45	23 "	169	47,943 00
	30	"	200,000	43,676 22	30 "	162	70,755 00
Aug.	13	"	275,000	59,744 44	13 "	149	89,018 00
	20	"	620,000	133,103 58	20 "	142	189,007 00
	21	"	300,000	64,148 75	21 "	141	262,233 00
		"	580,000	121,831 35			
	25	"	£8,115	44,450 27	27 "	135	60,008 00
Sept.	4	"	Frs. 200,000	42,800 69	4 Sept.	128	54,785 00
	6	"	200,000	42,722 98	6 "	126	107,728 00
		"	200,000	42,775 48			
	10	"	£5,000	27,708 15	10 "	122	124,660 00
	10	"	Frs. 350,000	74,472 50			
	9	" on N. York		1,727 00	9 "	123	2,531 00
		" "		330 50			
	24	" "		646 76	24 "	108	699 00
	26	" "		192 50	26 "	106	205 00
	27	" "		179 53	27 "	105	189 00
Oct.	4	"	200,000	40,720 16	4 Oct.	98	39,906 00
1874.							
January	12	4 % interest on 23,811 frs.		264 57			
		Balance		7,454 22			
				1,045,158 83			1,541,968 00

New York, January 12th, 1874. L. E. & Or.

(Signed) F. SCHUCHARDT & SONS.

173 SCHEDULE "A."

Statement of Claim Against N. O. Nat'l Bankiny Association.

1873.					
1	Oct.	To balance			$4,121 92
		" 7% interest to 12th Jan., 1874, 3 | 12			80 61
7	"	" unpaid remittance on Nat'l Ph. B'k			353 86
9	"	" protest charges on $156.75, Phila.			2 06
14	"	" " 100.00, "			2 06
24	"	" " 230.47 & $130			4 12
		" 7% interest on $362.10, 8 Oct., 3 | 8			6 81
28	"	" prot'd d'fts on G. Hannorat & Co.	fcs. 100,000 00		
		charges	614 60		
		4.87½	fcs. 100,614 60		20,807 44
		" 7% interest to 12 Jan., '74, 2 mo. 15 ds.			299 27
6	Nov.	" prot'd d'fts on G. Hannorat & Co.	fcs. 50,000 00		
		charges	" 310 85		
		4.87½	fcs. 50,310 85		10,396 42
		" 7% interest to 12 Jan., '74, 2 mo. 6 ds.			131 59
17	"	" unpaid acceptances on S. Frank & Co. & fees			12,501 31
		" 7% interest to 12 Jan., '74, 1.26			134 26
29	Dec.	" prot'd d'fts on Seignouret Freres	fcs. 250,000 00		
		charges	1,619 05		
		4.67½	fcs. 251,619 05		54,230 41
		" 7% interest to 12 Jan., '74, 14 ds.			145 60
1874.					
12	Jan.	" prot'd d'fts on A. Dutfoy & Co.	fcs. 400,000 00		
		charges	3,046 10		
		4.61¼	fcs. 403,046 10		88,366 92
		Total			$191,584 66

174 Deduct the following credits:

1873.				
11	Oct.	By remittance on New York	$732 13	
		" 7% interest to 12 Jan., '74, 3 mos.	12 62	
31	"	" remittance on New York	3,000 00	
		" 7% int. to 12 Jan., '74, 2 mo. 12	41 12	
31	"	" drafts of bank not paid	1,351 28	

		By 7% int. on $1,251.28 to 12 Jan., 1878, 2 | 12	18 65		
5	Dec.	" 1s. on £ div'd on £5,790 13s. prot'd Mallalien drafts	1,544 69		
		" 7% int. to 12 Jan.,'74, 37 ds.	10 95		
				6,711 74	
		Balance due currency ac.			$184,872 92
		Add			
1873.					
1	Dec.	To balance due on gold ac.	$18,556 57		
		7% int. to 12 Jan., '74, 1 mo. 12 ds.	149 46		
			$18,706 03		
		10% premium on gold	1,870 60		
				20,576 63	
		Total due by N. O. Nat'l B'k Ass. 12 Jan.,'74.			$105,449 55
		Of this amount, bonds in suit pledged to secure	$100,000 00		
		7% interest on $100,000 to 1 Jan., '80, 5 11 19	41,693 15		
		6% interest from 1 Jan., '80, to 19 Dec., '82, 2 11 18	17,720 55		
		as the amount over $100 M was never repaid			
		Amount of lien on the bonds due 19 Dec., '82	$159,413 70		
175					
1874.					
12	Jan.	Balance of above account			$105,449 55
		7% interest to 1 Jan., 1875, 11 mos. 18 ds.			7,037 70
		Add the following items:			
1874.					
5	Aug.	Platt, Gerard & Bowers, fees	$33 00		
5	"	Court fees	20 00		
5	"	Ferjus Fusileer, att'y fees	375 00		
23	Nov.	Cable	14 00		
30	Dec.	Ferjus Fusileer, att'y fees	100 00		
30	"	J. A. Charbonet, translating protests, &c.	50 00		
30	"	Share of costs of printing suit	320 90		
		F. A. Woolfley, special examiner	50 00		
		7% int. from 11 Nov. as date to 1 Jan., '75, 1 | 21	9 40		
				972 30	
					$113,459 55

Deduct the following credits:

1874.					
13	Feb.	2 | 6 on £ dividend on £3,045 5 | 7, less amount in dispute with O. Smith & Co., £587 4 3, £307 5 | 2, and int.	1,683 75		
21	"	Final dividend on prot'd bills on W. Mallalien & Co., £5,790 13, £574 8 6, & int. @ 5 48	3,160 08		
22	Ap'l.	Protested draft of Penns. Tie Co. coll'd in New Orleans	625 46		
23	Nov.	2s. div'd on estate P. Joyuson, £245 16 | 2, 4.90	1,204 46		
		7% interest from 28 Feb., '74, to 1 Jan., '75	389 04		
				7,062	79
		Balance due 1 January, 1875		$106,396	76
		1 year's interest, @ 7%, to 1 Jan., 1876		7,447	72
1875.					
1	Sept.	Add paid E. C. Billings' fees	$1,250		
		& int. to 12 Jan., '76	31 46		
				1,281	46
				$115,125	94

176 Deduct:

1875.					
13	July.	Final dividend on P. Joyuson's estate	$1,790 40		
1	Sept.	First dividend on G. Honnorat's estate	3,306 43		
		7% interest from 1 Aug., '75, av. date to 1 Jan., '76, 5 mos.	146 60		
				5,243	43
		Balance due 1 Jan., 1876		$109,882	51
1876.					
1	Jan.	1 year's int. @ 7% to 1 Jan., 1877		7,691	74
				$117,574	25
1876.					
25	Jan.	Add F. Fusileer's legal fees	300 00		
		Interest to 1 Jan., '77, 7%	19 38		
				319	38
				$117,893	66

1876.				
4 Dec.	Deduct final dividend on estate of P. Joynson		$523 73	
	27 days to 1 Jan., '77, @ 7%		2 71	
				526 44
	Balance due 1 Jan., '77			$117,367 19
	7% interest to 1 Jan., 1879, 2 yrs.			16,431 38
	Balance due 1 Jan., 1879			$133,798 57
1878.				
5 Sept.	Final dividend on G. Honnorat & Co. estate		$1,472 95	
	7% interest 1 Jan., 1879, 3 | 27		23 05	
				1,506 00
	Balance due 1 Jan., 1879			$132,292 57
	7% interest to 18 April, 1879, 3.17			2,714 70
	Balance 18 April, 1879			$135,007 27
177				
1879.				
18 April.	Dividend from receiver of bank			97,657 82
	Balance due 8 April, 1879			$37,349 45
	1 Jan., '80, @ 7%, 8 mo. 14 ds.		$1,819 35	
	Interest to 2 April, '80, 3 mo. 1 d., 6%		558 69	
				2,378 04
	Balance due to 2 April, '80			$39,727 49
1880.				
2 April.	Dividend from receiver of bank			9,765 78
	Balance due 2 April, '80			$29,961 71
	6% interest to 21 Nov., 1880, 1.7.19			2,925 60
	Balance due 21 Nov., '80			$32,887 31
1880.				
21 Nov.	Dividend from receiver of bank			9,765 78
	Balance due 21 Nov., 1880			$23,121 53
	6% interest to 19 Dec., '82, 2 yrs. 28			2,881 06
	Balance due 19 Dec., '82			26,002 59

178

SCHEDULE "B."

Claims Against Cavaroc & Son.

Banker's account.

1874.				
Jan. 12.	To balance as per accrued		$	$7,454 22
	7% interest to 1 Jan., 1880. 5 11 19			3,107 80
	6% " 19 Dec. 1882. 2 11 18			1,320 89
1875.				
Feb'y 9.	To retainer and counsel fee in suit Louisiana Nat'l B'k *vs.* F. Schuchardt & Sons			250 00
	7% interest to 1 Jan'y, 1880. 4 10 22			85 44
	6% " 19 Dec., 1882. 2 11 18			44 30
1876.				
Feb'y 19.	To taxable costs and disbursements up to this date in action Louisiana Nat'l Bank *vs.* Schuchardt	97 79		
	To counsel fee for services therein	250 00		
				347 79
	7% interest to 1 Jan'ry, 1880. 3 10 12			93 70
	6% " 19 Dec., 1882. 2 11 18			61 54
1878.				
Nov. 27.	To costs, disbursements, and counsel fee in action Louisiana Nat'l Bank *vs.* F'd'k Schuchardt & Sons			774 20
	7% interest to 1 Jan'y, 1880. 1 1 4			59 23
	6% " 19 Dec., 1882. 2 11 18			137 15
1878.				
Dec'b'r 28.	To judgment Louisiana Nat'l B'k suit, compromised at			9,500 00
	7% interest to 1 Jan'ry, 1880. 1 3 ds.			670 47
	6% " 19 Dec., 1882. 2 11 18			1,683 45
1879.				
March 12.	To counsel fees on settling Louisa. Nat'l B'k suit			101 51
	7% interest to 1 Jan'ry, 1880. 9 19			5 59
	6% " 19 Dec., 1882. 2 11 18			17 94
	Amount due 19 Dec., 1882			$25,715 22

179 *Copy of Pass Book, Exhibit "A." March* 31, 1883.

Chas. M. Fry, trustee, in account with the Bank of New York.

National Banking Association.

New Orleans coupon ac. in judgment against the city of New Orleans.

1882.		Dr.	1882.		Cr.
Sept. 7.	To c'k	$1,310 00	April 24.	By Rouse, $50	$19,950 00
1883.			May 23.	" $40	15,960 00
Jan. 16.	"	300 00	June 26.	" $35	13,965 00
18.		1,000 00	Aug. 15.	deposits	9,975 00
	balance	67,556 91	Dec. 16.	Rouse, $12.50	4,987 50
			27.	" $11.66	4,653 90
			30.	interest	675 51
		$70,166 91			$70,166 91
			1883.		
			Feb. 1.	By balance	$67,556 91

180 Depositions of William Grant, A. C. Lewis, E. W. Huntington, N. W. Casey, and W. W. Howe, witnesses produced, sworn, and examined on the days hereinafter named, viz., on the ninth (9th) and tenth (10th) days of February, in the year one thousand eight hundred and eighty-three, at the city of New Orleans, in the State of Louisiana, under and by virtue of a commission issued out of the circuit court of the United States for the southern district of New York, in a certain cause therein depending and at issue, wherein Frederick Dumont and others are complainants and Charles M. Fry, trustee, and others are defendants.

NEW ORLEANS, FRIDAY, *February 9th*, 1883.

Present: Thomas L. Bayne, Esq., counsel for complainants; J. D. Rouse, Esq., counsel for defendants.

F. A. WOOLFLEY,
Commissioner.

WILLIAM GRANT, of lawful age, being produced, sworn, and examined on behalf of Chas. M. Fry, trustee, deposeth and saith:

Direct examination by Mr. ROUSE:

Q. Are you a member of the firm of Rouse & Grant, of the city of New Orleans?

A. I am.

Q. What business are they engaged in?

A. Practice of the law.

Q. Do you know how long they have been in practice?

A. Been in practice together since 1876; both Mr. Rouse and myself have been in the practice of the law in the city of New Orleans since the year 1865, and previous to that in the State of Illinois.

Q. State what business the firm of Rouse & Grant have done for Charles M. Fry, the trustee of Schuchardt & Sons, in bankruptcy, in New York.

181 A. Chas. M. Fry, as trustee of Schuchardt & Sons, was, and I believe still is, the holder of two hundred and thirty-two seven per cent. bonds of the city of New Orleans upon which the coupons had not been paid on the 1st of January, 1881.

On the 18th of January, 1881, Rouse & Grant were employed by Mr. Fry to institute suit upon and collect the interest coupons due upon these bonds. A suit was filed on the coupons from June, 1875, to December, 1880, inclusive, amounting to $97,440; this suit included coupons due in June and in December, 1875, amounting to $16,240, to which the city pleaded the prescription of five years; we thereupon discontinued that suit as to the alleged prescribed coupons. Afterwards, on the 23d of May, 1881, we recovered judgment against the city of New Orleans, $81,200, with interest from the maturities of the several coupons in suit. We brought a separate suit against the city of New Orleans upon the coupons due in June and December, 1875, amounting to $16,240 and interest, these being the coupons which were embraced in the suit first brought, and as to which we discontinued the suit in order not to embarrass that case with the question of prescription upon these coupons. The suit on these alleged prescribed coupons has not been brought to a trial yet.

Q. State why it would have embarrassed the suit.

A. If we had not discontinued as to these alleged prescribed coupons and brought a separate suit we would have had a judgment in the original case for only a portion of the demand and a judgment against us as to another portion if the plea of prescription had been maintained, which would have necessitated the removal of the whole cause to the Supreme Court of the United States by writ of error and prevented the execution of that portion of the judgment to which there was no defense.

Afterwards we were instructed to bring and we brought
182 suit for Mr. Fry, trustee, against the city of New Orleans upon 232 coupons, cut from these same bonds, of $35 each, in all $8,120, maturing in June, 1881. We obtained judgment in this case for the full amount claimed on the 28th June, 1881.

Executions were issued on both of these judgments and returned *nulla bona*. This necessitated other proceedings to obtain satisfaction of the judgment.

We accordingly filed a petition in the case of the U. S. *ex rel.* Charles M. Fry, trustee, &c., *vs.* The City of New Orleans.

On the 6th day of July, 1881, we obtained a mandamus in that proceeding, directing the city to levy a tax sufficient to pay the first judgment for $81,200 and interest and cost—amounting in all to $94,831.30. Afterwards, on the 3d day of November, 1881, we filed a suit in the United States circuit court, entitled U. S. *ex rel.* Charles M. Fry, trustee, against The City of New Orleans, for the purpose of obtaining a mandamus to levy a tax to pay the second judgment for $8,120, interest and costs, which resulted in a judgment directing a levy of a tax to pay the sum of $8,120, interest and cost—amount-

ing in all to $8,455.98. Afterwards we brought a suit for Charles M. Fry, trustee, against The City of New Orleans, on 232 interest coupons, $35 each, cut from said bonds, against the City of New Orleans, for $8,120 and interest. Judgment in this suit was rendered against the city of New Orleans, on a verdict of the jury, on June 8th, 1882. On the 6th of June, 1882, we brought another suit for Charles M. Fry, trustee, against The City of New Orleans, on 232 coupons, of $35 each, cut from said city bonds, in all for the sum of $8,120 and interest; and afterwards, on the 27th day of November, judgment was rendered in favor of Mr. Fry against the city of New Orleans for the amount of those coupons in principal and interest.

183 Q. Were any suits brought by the city of New Orleans against Mr. Fry on account of taxes alleged to have been assessed upon the amount of the judgment which he recovered against the city, or coupons which were put in judgment in those suits?

A. The city of New Orleans has brought suit against Mr. Fry in the civil district court for the parish of Orleans. We notified Mr. Fry of the pendency of that suit. The city in that suit claims $3,351.53 as taxes on these judgments which we have recovered, and referred to in my evidence. Mr. Fry instructed us to defend this suit. We have put in an answer and removed the cause to the United States circuit court, where it is now pending.

Q. Was there any threatened effort on the part of the State tax collector to enforce the payment of a tax assessed against Mr. Fry upon any of these judgments; and, if so, what proceedings were had by reason thereof.

A. The State tax collector, under a pretended assessment of these judgments, claimed that he had a lien upon them for a tax of six mills on the dollar due the State of Louisiana, and he threatened to seize the judgment and sell it in satisfaction of that tax. Mr. Fry directed us to defend the pretensions of State to this tax. We have accordingly filed a bill to enjoin the tax collector from selling these judgments; an injunction has been obtained against him; the bill has been taken for confessed for want of an answer and final decree will be rendered in due course.

Q. What amount of collections have been made on account of the judgments upon which mandamus was obtained for a levy of a tax to pay the same?

A. We have collected from the city of New Orleans on these judgments, up to December 13th, 1882, the sum of $77,853.57.

Q. What amount did Mr. Fry advance to us for the purpose of paying cost for the institution of the suit originally?

A. Sixty dollars.

184 Q. What amount has your firm remitted to Mr. Fry or paid upon his drafts?

A. We have remitted to Mr. Fry, of this sum collected, $69,662.56.

Q. What amount has been paid out for cost and expenses attending the litigation?

A. $465.60.

Q. What fees were paid by Mr. Fry to your firm of Rouse & Grant prior to the collections as a retainer?

A. The sum of $1,000 was paid as a general retainer when we entered in this business.

Q. What amount was charged and deducted upon account of the services rendered and to be rendered in the several matters in litigation of which you have spoken?

A. $7,785.35.

Q. Or (10%) ten per cent. upon the gross collections?

A. Yes; made up to the date of the rendition of our bill and account to Mr. Fry.

Q. State whether there is any unusual trouble attending the collection of these credits from the city of New Orleans on account of the tax collected over that ordinarily incurred in collecting judgments from debtors who are able to pay or upon execution?

A. Well, in the first instance, we have to recover judgment at law, exhaust our remedy on execution; after that, in order to get satisfaction of the judgment, we are compelled to bring proceedings by mandamus to compel the city of New Orleans to levy a tax and to collect it—sufficient to pay the amount of the judgment, interest, and cost.

Q. Now state the unusual methods attending the collection of the amount paid by the city upon these judgments, including the requirements of the court, to retain your coupons and to surrender them according to the payments made.

A. Well, to begin with, at the request of the city, the court ordered the coupons upon which these various suits were entered to be surrendered, from time to time, as the judgments or portions of the judgments were paid. The solicitors for the plaintiffs were compelled to retain and take charge of these coupons. Every
185 month, when the tax had been collected and was being distributed to the judgment creditors, solicitors had to go and find out the amount, obtain the coupons from their strong box, surrender them to the city, get their warrants for the payment of the amount due, and have them cashed. All these things which we have done is in addition to what is usually done in the execution of judgments, and entailed upon counsel for complainants a great deal of trouble and loss of time.

Q. And responsibility for the custody of the coupons?

A. And responsibility for the custody of the coupons. In addition to all this, the city of New Orleans applied for and obtained a writ of error from the Supreme Court of the United States in the first mandamus case involving $81,200 and interest. We attended upon the application of the city for that writ; it was granted, but the city neglected to take up a copy of the record. We were compelled and we did go to the Supreme Court of the United States, and — dismissed the writ of error for want of prosecution.

Q. State, if you please, what the charge of ten per cent. upon actual collections, in addition to the retainer of $1,000 dollars paid by Mr. Fry, was intended to cover.

A. We considered that a fee of ten per cent. on gross collections,

in addition to the retainer which we had made and which we may make upon these judgments, would be a reasonable fee to cover all these services which we have enumerated and which we are compelled to continue until the end of these suits—that is, I think if we defend Mr. Fry in these tax suits, if we prosecute these judgments to final collection and take charge of the business from first to last, including the suits necessary to obtain judgments and mandamus which have not been obtained and which is part of our duty, *I think* ten per cent. of the gross collections would be reasonable compensation.

186 Q. And that is the compensation you contemplate in your account?

A. Yes, sir; the only charge we have made is a percentage upon the gross collections in addition to the original retainer.

Q. About how much interest upon these interest coupons is embraced in the mandamus tax which we are now collecting?

A. About $14,000 of interest upon interest. We have made no charge for the special services which I have recounted. We intend that the charge of ten per cent. on the gross amount shall cover all services which we may render in the collection of interest coupons, completion of all the business, protection of those judgments from claims for taxes.

Cross-examination by Mr. BAYNE:

Q. Then, I understand from that last answer, Major Grant, that your intention is and has been to make the charge of ten per cent. cover all services of every nature connected with the question of the recovery of this fund and of its protection?

A. That has been our intention.

Q. That is your intention then and now?

A. Yes, sir; not only upon what we have already collected, but what we may collect in the future.

Q. I mean to say ten per cent. upon such sums of money as you shall finally collect?

A. Yes, sir.

WILLIAM GRANT.

Sworn to and subscribed before me this 9th day of February, A. D. 1883.

F. A. WOOLFLEY,
Commissioner.

Examination taken, reduced to writing by my stenographer by consent of said counsel, and by the said witness subscribed and sworn to after due reading of the foregoing, this 9th day of February, 1883, before me—

[L. S.] F. A. WOOLFLEY,
Clerk U. S. Circuit Court, Eastern District of Louisiana, at New Orleans, La., Commissioner.

187 A. C. LEWIS, of lawful age, being produced, sworn, and examined on behalf of Charles M. Fry, trustee, deposeth and saith:

Direct examination by Mr. ROUSE:

Q. Where do you live?

A. In the city of New Orleans.

Q. What is your profession?

A. Lawyer.

Q. How long have you been engaged in the practice of the law in New Orleans?

A. About thirteen years.

Q. State whether you have had cases for your clients against the city of New Orleans upon past-due coupons cut from bonds issued by her.

A. I have on almost all classes of coupons.

Q. State how extensively you have prosecuted suits of that kind.

A. Well, in one way or another, I suppose I have collected, in connection with my partner, who is now dead, $200,000 or $250,000; I don't know exactly. We obtained judgments upon the coupons and the judgments all bore interest on the coupons. In a good many of those cases we were obliged, after issuing executions upon the judgments, which executions were returned *nulla bona*, to resort to a second proceeding by way of mandamus in order to compel the city to levy a tax to pay them.

Q. You have heard the testimony of Mr. Grant as to the services rendered and proceedings taken by the firm of Rouse & Grant in behalf of Charles M. Fry, trustee?

A. I have heard the testimony of Mr. Grant, and, independent of that, I am pretty familiar with the proceedings of Fry *vs.* The City of New Orleans, from the records of the court, which I have frequently examined.

Q. What do you think their services are worth for the suits brought, collections made, suits defended, and proceedings in progress which they propose to complete?

188 A. Well, in no case have I ever charged less than ten per cent. on amount of collections. That is the lowest I ever charged in any case against the city. In some cases I got fifteen per cent. and some twenty.

Q. You have heard that the fees which Rouse & Grant charged Mr. Fry in this business, in addition to the retainer of $1,000, were ten per cent. upon their gross collections. What do you think of the fee—as to its being reasonable or unreasonable?

A. Judging from what I have collected myself I should judge it was reasonable.

Q. Judging by the services rendered and suits proposed to be carried to completion—taking that as the standard—what is your opinion?

A. I think it is very reasonable. I will say this: So far as the collection of the balance of the judgments, I make no charge; but where the judgments are taxed and I am called to resist that tax

I expect to charge a fee in addition to my fee of ten per cent.; it is not ten per cent. for all cases. In cases where the judgments are assessed by the city and State and suits instituted for the collection of those taxes I intend to charge for defending those suits.

Cross-examination by Mr. BAYNE:

Q. Have you prosecuted any suits on these seven per cents.?

A. I think we have had suits on every series; I know we have had some seven per cents.

Q. Your litigation generally against the city has been on other classes of bonds?

A. No, sir; we have had consolidated bonds, seven per cents., ten per cents., water-work bonds, almost every issue of the city, but the lowest fee that was ever paid me was ten per cent.

A. C. LEWIS.

Sworn to and subscribed before me this 9th day of February, A. D. 1883.

F. A. WOOLFLEY,
Commissioner.

189 Examination taken, reduced to writing by my stenographer by consent of said counsel, and by witness subscribed and sworn to after due reading of the foregoing, this 9th day of February, 1883, before me—

[L. S.] F. A. WOOLFLEY,
Clerk U. S. Circuit Court, Eastern District of Louisiana, at New Orleans, La., Commissioner.

E. W. HUNTINGTON, of lawful age, being produced, sworn, and examined, deposeth and saith:

Direct examination by Mr. ROUSE:

Q. You reside in the city of New Orleans?

A. Yes.

Q. And you are a practicing lawyer in this city?

A. Yes; I have been practicing about 28 or 29 years in New Orleans. I have heard the testimony of Mr. Grant, and I am of opinion that the services of the firm of Rouse & Grant are well worth the sum which they have charged—is reasonably worth that sum. I have prosecuted one or more of those cases and I have charged ten per cent. I dissolved my connection with the cases after the mandamus was issued, and I didn't render any further service. My client took charge of the judgment I obtained for him.

Q. You charged ten per cent. on the amount of the judgment and not upon the collections?

A. Yes; on the amount that I recovered, and it was paid without any hesitation.

190 Cross-examination by Mr. BAYNE:

Q. Do you remember whether you had any of these seven per cent. bonds?

A. No, sir.

E. W. HUNTINGTON.

Sworn to and subscribed before — this 9th February, A. D. 1883.

F. A. WOOLFLEY,
Commissioner.

Examination taken, reduced to writing by my stenographer by consent of said counsel, and by the said witness subscribed and sworn to after due reading of the foregoing, this 9th day of February, 1883, before me—

[L. S.] F. A. WOOLFLEY,
Clerk U. S. Circuit Court, Eastern District of Louisiana, at New Orleans, La., Commissioner.

Counsel for complainants and for Reynes & Laborde read from the commission the following:

N. W. CASEY, of lawful age, being produced, sworn, and examined on behalf of Cavaroc & Son's assigness and Frederic Dumont, deposeth and saith:

Direct examination by Mr. BAYNE:

Q. You are the receiver of the New Orleans National Banking Association?

A. Yes, sir; and have been since June 30, 1874.

Q. And have in your possession the books and letter books of the New Orleans National Banking Association?

A. Yes, sir.

Q. Will you please state whether or not F. Schuchardt & Sons or their trustee, Charles M. Fry, has at any time made proof of
191 any claim against the New Orleans National Banking Association; if so, what was that proof?

A. Charles M. Fry, trustee of Schuchardt & Sons, has made proof of this claim for $195,315.63, based on an account I now furnish a copy of, marked "Exhibit A," being an account in currency for $180,624.58 and in gold $14,691.05, coupled with the statement under the head of assets appearing upon said account as a part thereof.

Q. No other proof has ever been made except the proof which is here furnished in this account?

A. For Schuchardt & Sons?

Q. Yes.

A. None other.

Q. And it was made at the date at which that account purports to be made?

A. The proof of the debt was finally allowed and certificate issued on the 8th of April, 1879.

Q. Have you paid dividends to Fry, trustee of Schuchardt & Sons?

A. Yes, sir; he has been paid sixty per cent. on the account of his claims, $195,315.63.

Q. Will there be a further dividend, do you think?

A. Yes, sir.

Q. Do you know anything about any rate of interest about the accounts between these parties?

A. No; I do not.

Q. Do you know about these protested drafts on A. Dutfoy, referred to in this account, for 200,000 francs, 155,000 francs, and 35,000 francs; do you know what those drafts were, how they were drawn, or by whom they were drawn?

A. I have a statement here that was made up by Mr. Blache for me; I will give you from that; he did it from the books of the bank; they were drafts of the New Orleans National Banking Association drawn on A. Dutfoy & Co., payable 29th February, 1873, amounting to 200,000 francs and not accepted; 150,000 francs payable
192 10th December, 1873. The drafts of the New Orleans National Banking Association on A. Dutfoy & Co. appear by the books of the bank as amounting to 400,000 francs. These were not accepted and appear to have been held by Schuchardt & Sons.

These bills were not returned to the receiver of the bank when they were proved, but were retained by Schuchardt & Sons in the hope of receiving something from the other parties. The other part of their claims appears to be bank drafts on Honorat for 150,000 francs. The drafts appearing in the account under date of December 29th as protested drafts on Signouret Freres & Co., amounting to 250,000 francs, were also drafts drawn by the New Orleans Banking Association on Signouret Freres, and so also were the drafts on Honorat, described in the account, amounting to 150,000 francs.

Q. The acceptance of the proof of this debt was finally made in April, 1879; was it made here or in New York?

A. It was made here—that is, the proof was made; the affidavit was made by Mr. Fry in New York and remitted to me, and upon that I issued the certificate.

Q. This account seems first to have been made up in 1876; were there not various accounts—long negotiations with Fry—before his account was finally adjusted?

A. He sent me an account previously which was objected to and some other matters which prevented the settlement of it.

Q. The settlement was finally made in New York through counsel?

A. Yes, sir—that is, the agreement was made there and the certificate was issued here.

Q. The certificate was issued on the 8th of April, 1879, and was for $195,315.63, as stated?

A. Yes, sir.

Q. Do your certificates bear interest or have you paid interest on any of your certificates?

A. I have never paid any interest; payments are made on account of the indebtedness simply.

193 Q. Do you know whether or not you have ever allowed claims for damages on any bills?

A. Yes; I have allowed damages on foreign bills.

Q. For non-acceptance or non-payment or both?

A. Only one damage.

Q. Do you know what for?

A. I think for non-payment. I can't say positively. I don't remember allowing damages for non-acceptance. I have no recollection of ever making allowance for non-acceptance of drafts.

Q. In the matter of Honorat you had some claims for the bank and received a dividend from Honorat of fifteen per cent., did you not?

A. Schuchardt collected that. It is credited in that account "A."

No cross-examination.

N. W. CASEY.

Sworn to and subscribed this 9th day of February, A. D. 1883.

F. A. WOOLFLEY,
Commissioner.

Examination taken, reduced to writing by my stenographer by consent of said counsel, and by the said witness subscribed and sworn to after due reading of the foregoing, this 9th day of February, 1883, before me—

F. A. WOOLFLEY,
Clerk U. S. Circuit Court, Eastern District of Louisiana, at New Orleans, La., Commissioner.

Adjourned to Saturday, February 10, 1883.

194 NEW YORK, *City, County, and State,* } ss:

Charles M. Fry, being duly sworn, deposes and says that he is the trustee in bankruptcy of the late firm of Fred'k Schuchardt & Sons, of the city of New York, bankers; that from the examination of the affairs of said firm and to the best of deponent's knowledge, information, and belief the balances of the accounts annexed, amounting to $180,624.58 in currency and $14,691.05 in gold, are justly due from the late New Orleans National Banking Association to this deponent as such trustee over and above the offsets, discounts, and payments, and that deponent holds no collaterals thereto or securities therefor except such as are specified in the said account hereto annexed.

(Signed) CHAS. M. FRY.

Sworn to and subscribed before me, a notary public in said county, this twenty-fifth day of June, 1878.

Witness my hand and seal the day and year above written.

(Signed) HENRY L. SWIFT,
Notary Public (No. 167), N. Y. Co.

[SEAL.] F. A. WOOLFLEY,
Commissioner.

195 DR. *N. W. Casey, Receiver New Orleans Nat'l Banking*

Charles M. Fry, trustee.

1873.				
Oct'r	1.	To balance		$4,121 92
	4.	" days' interest on $4,121.92, @ 7%		3 20
	7.	" unpaid rem. on Nat'l Park Bank		353 86
	9.	" protest charges on rem. on Phila., $156.75		2 06
	14.	" " " " " $100		2 06
	24.	" " " " $230.47 & $130		4 12
	28.	" protested drafts on G. Honorat & Co. at Marseilles f'cs 150,000		
		10% damages 15,000		
		f'cs 165,000—487½		33,846 15
Nov'r	17.	" unpaid acceptances of S. Frank & Co.		12,500 00
		" protest charges on same		1 31
Dec'r	29.	" protested drafts on Seignouret Freres & Co., Bordeaux, p'ble per Paris— f'cs 250,000		
		10% damages 25,000		
		f'cs 275,000—487½		56,410 26
1874.				
Jan'y	12.	" protested drafts on A. Dutfoy & Co. at Paris f'cs 200,000 29 Nov'r, '73		
		155,000 10 Dec., "		
		35,000 13 " "		
		10,000 19 " "		
		10% damages 40,000		
		f'cs 440,000—487½		90,256 41
				$197,501 35
1875.				
Sept.	1.	To balance		$182,079 53
1877.				
Sept.	5.	By 5% dividend on protested acceptances of G. Honorat & Co., of Marseilles, f'cs 50,M, less charges, f'cs 7,420		1,472 95
				$180,624 58

F. A. WOOLFLEY,
Commissioner.

196 *Association, Acc't with F. Schuchardt & Sons.* CR.

1873.			
Oct'r 11.	By rem. on New York, 60 ds., No. 28476		$732 13
13.	" " " " " " " 28514		3,000 00
	" unpaid drafts Nos. 6234, 6466, 9891, 9984, 10260, 10423, 10559		1,351 28
Dec. 5.	" 1s. on £1, div'd £5,790 13, protested drafts on W. Mallalien & Co., £289 15 6, int. 19 3 8		1,544 69
1874.			
Feb'y 13.	" 2 3 6 on £ on amount of claim, £3,045 5 7, less am't reserved in dispute with Caleb Smith & Co., £307 5 2 and int. @ $5.46		1,638 75
21.	" final div'd on prot'd d'fts, £5,790 13 on W. Mallalien & Co., £574 8 6 and int. @ 5.48		3,160 08
22.	" protested rems. on Penns. Ice Co., collected by Ch's De Ruyter, Esq.		625 46
1875.			
Sept. 1.	" 1st div'd of 10 ds. on ac. f'cs 15 M, protested drafts on G. Honorat & Co., f'cs 15,000, less charges, f'cs 79.45, f'cs 14,920.55 @ 5.15, $2,897.20, gold, @ 111⅛		3,306 43
	" balance		182,097 53
			$197,501 35

E. & O. E.
New York, 1st September, 1875.
(Signed) CHAS. M. FRY,
Trustee of Fred. Schuchardt & Sons.

F. A. WOOLFLEY,
Commissioner.

Assets.

$182,000	"	"	New Orleans city bonds.
About 24,000	"	"	collected coupons of above bonds, alleged to have — collected by Fred'k Schuchardt & Sons, pending disputed ownership of bonds.
About £7,000	"		stg. fund in London with Union Bank; also
f'cs 38,000	"		claimed as due F. S. and Sons and in hands of A. Dutfoy & Co., of Paris.
$56,000	"	"	New Orleans city bonds.

E. & O. E.

F. A. WOOLFLEY,
Commissioner.

197 "A."

At the execution of a commission for the examination of witnesses wherein Frederick Dumont and others are complainants and Charles M. Fry, trustee, and others are defendants this paper writing marked "A" was produced and shown to N. W. Casey and by him deposed unto at the time of his examination, before—

[SEAL.] F. A. WOOLFLEY,
Clerk U. S. Circuit Court, Eastern District Louisiana, at New Orleans, La., Commissioner.

New Orleans, February 9th, 1883.

N. W. CASEY.

R. W. Casey, Receiver of the New Orleans Nat'l Banking Ass'n, in Acc't with F. Schuchardt & Sons.

DR.

1873.			
Oct.	1.	To balance as per ac. rendered	$68,231 17
	2.	" cable to Paris	18 00
	4.	" 4 ds.' int. @ 7%, $68,231.17	53 07
1874.			
Nov.	23.	" cable	14 00
			$68,316 24
1876.			
Dec.	4.	To balance	$14,691 05

F. A. WOOLFLEY,
Commissioner.

198 CR.

1874.			
Oct.	16.	By rem. from Seasongood, Netter & Co.	$246 13
"	18.	" " " Union National Bank	222 45
"	28.	" " on New York, 60 ds., No. 28505	1,000 00
"	18.	" proceeds of 100 b. c. ex. "Lancaster," ftg. to £1,400 st'g on Melhuish & Co., £133 8 9, and int. £12 10 5; £1,350 1 7, 107½	6,450 38
"	18.	" proceeds of 598 b. c. ftg. to £8,289 17 3 on C. Melhuish & Co., £575 12 8, and £59 15 2; £7,635 7 10 @ 107½	36,480 20
Nov.	2.	" on ac. unpaid acceptance P. Jayson, £4,191; £1,144 4, and int. £11 11 4; £1,155 10 4	5,522 00
		" ac. of P. Jayson's unpaid acceptances for £4,194 7; £38 10, £2 8 int., £38 12 8	185 44
Dec.	23.	" 2d div'd in estate of Peter Jayson	1,204 46
1875.			
July	13.	" balance of proceeds of claim against Peter Jayson, $366 2 8 @ 489	1,790 40

1876.

Dec. 4.	" final dividend against P. Jayson's dishonored acceptance £108 15 5, 481½		523 73
	Balance		14,691 05
			$68,316 24

New York, 4th Dec., 1876. E. & O. E.

(Signed) CHAS. M. FRY,
Trustee of Fred. Schuchardt & Sons.

F. A. WOOLFLEY,
Commissioner.

199 Taking of depositions resumed pursuant to adjournment.

NEW ORLEANS, SATURDAY, *February 10th*, 1883.

Present: Thomas L. Bayne, Esq., counsel for complainants; J. D. Rouse, counsel for defendants.

Judge W. W. HOWE, of lawful age, being produced, sworn, and examined for Cavaroc & Son's assignee and Frederick Dumont, deposeth and saith:

Direct examination by Mr. BAYNE:

Q. You are a member of the bar in Louisiana?
A. Yes.
Q. For how many years?
A. Fifteen or sixteen years.
Q. You have been on the supreme bench of Louisiana as one of the justices for several years?
A. Yes; for four years.
Q. What is the legal rate of interest in Louisiana?
A. Five per cent. per annum in the absence of agreement.
Q. It is established by an article of the civil code, is it not?
A. Yes; article 2924 of the civil code provides that five per cent. is the legal interest on all sums which are the object of judicial demand; that parties may agree for a higher interest up to eight per cent., and that such agreement must be fixed in writing, and testimonial proof of it is not admitted in any case. The legal rate of interest in the State is five per cent. per annum in the absence of an express contract to pay more.

W. W. HOWE.

Sworn to and subscribed before me this 10th day of February, A. D., 1883.

F. A. WOOLFLEY,
Commissioner.

200 Examination taken, reduced to writing by my stenographer by consent of said counsel, and by the said witness subscribed

and sworn to after due reading of the foregoing, this 10th day of February, 1883, before me—

[L. S.] F. A. WOOLFLEY,
Clerk U. S. Circuit Court, Eastern District of Louisiana, at New Orleans, La., Commissioner.

Adjourned to Thursday, February 15th, 1883.

Taking of depositions resumed pursuant to adjournment.

NEW ORLEANS, THURSDAY, *February* 15, 1883.

Present: Thomas L. Bayne, Esq., counsel for complainants; J. D. Rouse, counsel for defendants.

Mr. Bayne, on behalf of complainants, offers in evidence copy of proof of debt by A. Luria, cashier of the Louisiana National Bank of New Orleans, in the matter of C. Cavaroc & Son, bankrupts, attested by J. Ward Gurley, Jr., register in bankruptcy, marked Exhibit B by the commissioner and annexed; also copy of bond executed by the Louisiana National Bank of New Orleans in favor of F. Laborde, and E. H. Reynes, assignee of C. Cavaroc & Son,
201 attested by J. Ward Gurley, Jr., register in bankruptcy, marked Exhibit C by the commissioner and annexed. The taking of depositions under said commission is now here closed.

New Orleans, February 15th, 1883.

[L. S.] F. A. WOOLFLEY,
Clerk U. S. Circuit Court, Eastern District of Louisiana, at New Orleans, Louisiana, Commissioner.

Costs for executing the annexed commission, twenty-five dollars ($25.00), paid by J. D. Rouse, Esq, counsel for Charles M. Fry, one of the defendants.

New Orleans, February 22d, 1883.

F. A. WOOLFLEY,
Commissioner.

202 EXHIBIT B. Offered in Evidence on Behalf of Complainants February 15, 1883. F. A. Woolfley, Commission.

(Copy.)

No. 23132.

Exchange for $10,000.00. NEW ORLEANS, *October* 1*st*, 1873.

At sight of this first of exchange (second unpaid) pay to the order of Louisiana National Bank ten thousand dollars, value received, and charge to account—

(Signed) C. CAVAROC & SON.

To Messieurs F. Schuchardt & Sons, New York.

C. Cavaroc & Son.

No. 23132.

(Original.)

(Endorsed:) Pay the Third National Bank of New York or order. (Signed) A. Luria, cash.

At the execution of a commission for the examination of witnesses between the Louisiana National Bank of New Orleans, plaintiff, and Frederick Schuchardt and others, defendants, this paper writing was produced and shown to C. Cavaroc, Esq., Abraham Luria, Esq., and Joseph H. Oglesby, Esq., and was by them deposed unto at the time of their examination before us, undersigned, commissioners.

(Signed) C. CAVAROC.
J. H. OGLESBY.

A. LURIA,
FRED. D. KING,
M. E. LEVANDIAS,
Commissioners.

203 PLAINTIFF'S EXHIBIT "A."

(Copy.)

UNITED STATES OF AMERICA, }
State of New York, } *ss:*

On the 6th day of October, 1873, at the request of the Third National Bank of the City of New York, I, Thomas Cowan, a notary public, duly admitted and sworn, dwelling in the city of New York, did present the original draft hereunto annexed to F. Schuchardt & Sons, at their place of business, 21 Exchange Place, New York city, and demanded payment thereof, who refused to pay the same; answered, "No funds."

Whereupon I, the said notary, at the request of aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and endorser of the said draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereinafter incurred for want of payment of the same.

This done and protested in the city of New York aforesaid this day and year aforesaid written.

In testimonium veritatis.

[Seal Thomas Cowan, Notary Public, New York.]

(Signed) THOMAS COWAN,
Notary Public.

(Endorsed:) "Filed on April 25. (Signed) J. Ware."

204 EXHIBIT B.

(Copy.)

(U. S. I. R. stamp, 2 cents.)

No. 23140.

C. Cavaroc & Son.

Exchange for $20,000.00. NEW ORLEANS, *October* 2*d*, 1873.

At sight of this first of exchange (second unpaid) pay to the order of Henry Blache, cashier, twenty thousand dollars, value received, and charge same to account—

(Signed) C. CAVAROC & SON.

To Messrs. F. Schuchardt & Sons, New York.

No. 3223.

(Original.)

(Written across the face:) Payable through clearing-house.

(Endorsed:) Henry Blache, cashier. Pay the Third National Bank of New York or order. A. Luria, cashier.

At the execution of a commission for the examination of witnesses between the Louisiana National Bank of New Orleans, plaintiff, and Frederick Schuchardt and others, defendants, this paper writing was produced and shown to C. Cavaroc, Abraham Luria, and
205 Joseph H. Oglesby, Esqs., and was deposed unto by them at the time of their examination before us, the undersigned, commissioners.

C. CAVAROC.
JOS. H. OGLESBY.

A. LURIA,
FRED. D. KING,
W. E. LEVANDIAS,
Commissioners.

PLAINTIFFS' EXHIBIT "B."

(Copy.)

UNITED STATES OF AMERICA, } ss:
State of New York, }

On the 7th day of October, 1873, at the request of the Third National Bank of the City of New York, I, Thomas Cowan, a notary public, duly admitted and sworn, dwelling in the city of New York, did present the original draft hereunto annexed to Messrs. F. Schuchardt & Sons at their office, No. 24 Exchange Place, in the city of New York, and demanded payment thereof, who refused to pay the same and answered, "No funds."

Whereupon I, the said notary, at the request aforesaid did pro-

test, and by these presents do publicly and solemnly protest, as well against the drawer and endorsers of the said draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the same.

Thus done and protested in the city of New York aforesaid the day and year first above written.

In testimonium veritatis.

[Seal Thomas Cowan, Notary Public, New York.]

(Signed) THOMAS COWAN,
Notary Public.

206 Form No. 23.

Declaration for Proof of Debt by Officer of Corporation.

DISTRICT OF LOUISIANA, *ss:*

In the District Court of the United States for the District of Louisiana.

In the Matter of C. CAVAROC & SON, Bankrupts. Bankruptcy.

I, A. Luria, of New Orleans, in the parish of Orleans and State of Louisiana, cashier of Louisiana National Bank, being a corporation incorporated by and under the laws of the State of Louisiana and carrying on business at New Orleans, in the State of Louisiana, being duly sworn, do solemnly declare that I am such officer and duly authorized to make this proof, and that the statement of the bills of exchange drawn by C. Cavaroc & Son and now held and owned by said corporation, and being for money paid for bankrupts between the said corporation and the said bankrupts, hereunto annexed, is a full, true, and complete statement of account between the said corporation and the said bankrupts, and that it is within my own knowledge that the debt thereby appearing to be due from estate of said bankrupt to the said corporation was incurred on or before the 6th and 7th days of October, 1873, and for the consideration therein stated, and that to the best of my knowl-
207 edge and belief the said debt still remains unpaid and unsatisfied; and I do further declare that said claim was not procured for the purpose of influencing the proceedings under said act, and that no bargain or assignment, express or implied, has been made or entered into by or on behalf of said corporation to sell, transfer, or dispose of the said claim or any part thereof against such bankrupt, or to take or to receive, directly or indirectly, any money, property, or consideration whatever whereby the note of such corporation or of any person in the proceedings under said act was, is, or shall be in any way affected, influenced, or controlled.

The first of said bills of exchange is for the sum of $10,000 and the second of said bills for $20,000, making this debt ($30,000) thirty thousand dollars, and interest since the date of protest. Said bills are dated New Orleans, October 1st and 2d, 1873, respectively,

and both signed and made by C. Cavaroc & Son; all of which, together with other necessary particulars, will appear from the copies of said bills and protests, annexed as part of this proof.

(Signed) A. LURIA, *Cashier.*

Declared under oath, at New Orleans, this 25th day of April, A. D. 1876, before me—

(Signed) J. WARD GURLEY, Jr.,
Register in Bankruptcy.

Endorsed: No. 1504. U. S. dist. court. In the matter of Chas. Cavaroc & Son, bankrupts. Proof of debt by officer of corporation. Proof satisfactory and filed April 25th, 1876. (Signed) J. Ward Gurley, Jr., register in bankruptcy. Fees, $1.50, p'd.

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REGISTER'S OFFICE,
NEW ORLEANS, LA., *Feb.* 9, 1883.

I, J. Ward Gurley, Jr., register in charge of the bankruptcy of Chas. Chavaroc & Son, hereby certify these attached seven sheets of paper to contain a full, true, and complete copy of the proof of debt of the Louisiana National Bank and the exhibits thereto attached as the same stands on file in the records of my office.

Attest: J. WARD GURLEY, Jr.,
Register in Bankruptcy, East. Dist. of La.

We admit that J. Ward Gurley, Jr., was and still is register in bankruptcy in and for said district and is in charge of the bankruptcy of C. Cavaroc & Son, and his certificate as such is entitled to full faith and credit, and that his signature to the foregoing certificate and to the certificate upon the copy of bond annexed is genuine.

New Orleans, February 15, 1883.

ROUSE & GRANT,
Sol'rs for Chas. M. Fry, Trustee.

(Produced by counsel for Cavaroc's assignees and Dumont.)

EXHIBIT "C." Offered in Evidence on Behalf of Complainants February 15, 1883. F. A. Woolfley, Commissioner.

Know all men by these presents that the Louisiana National Bank, as principal, and Thomas L. Airey, as surety, are held
209 and firmly bound to F. Laborde and E. H. Reynes, the assignees of C. Cavaroc & Son, in the full sum of five thousand dollars, for the payment — which we bind ourselves firmly by these presents.

Whereas the Louisiana National Bank is a creditor of C. Cavaroc & Son for ten thousand dollars, and whereas there are dividends due to said bank in the distribution of the estate of said bankrupt, but which have been withheld because of the impression that the bank had securities in its hands, or that there are securities pledged

for said debt, and it is affirmed by said bank that it has no securities and that its said debt is unsecured, the condition of this obligation is that if the bank derives the benefit of any securities pledged for said debt it will account to and hold harmless the said F. Laborde and E. H. Reynes, assignees, for paying over said dividends to said bank, irrespective of and without deducting the value of said securities, as provided by law in respect to secured creditors; and if, in the event it shall turn out that the said debt is a secured debt, the said bank shall make good any sum in the way of dividends it has received over and above what it would have been entitled to receive had such securities been valued as required in the case of the secured creditors, these these things done by the said bank, if it shall turn out that its said debt is a secured debt, this obligation to be void, and to be wholly void and null unless it is ascertained that the said bank is or was a secured creditor, on which contingency is this obligation to have effect according to its tenor.

(Signed) JOS. H. OGLESBY.
THOS. L. AIREY.

Attest: A. LURIA.

(Endorsed:) "Filed Jan'y 6th, 1879. (Signed) J. Ward Gurley, Jr., register."

210 REGISTER'S OFFICE,
NEW ORLEANS, LA., *Febr'y 9th*, 1883.

I, J. Ward Gurley, Jr., register in charge of the bankruptcy of Chas. Cavaroc & Son, do hereby certify that these two attached sheets of paper contain a true, full, and complete copy of the bond of the Louisiana National Bank for five thousand dollars as the same stands on file in the records of my office.

Attest: J. WARD GURLEY, JR.,
Register in Bankruptcy, East Dist. of La.

Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT *et al. vs.* CHARLES M. FRY, Trustee, *et al.*

To the judges of the circuit court of the United States for the southern district of New York:

In discharging the duties assigned me by the decree made and entered herein on the 6th day of December, A. D. 1882, I have been attended by counsel for the respective parties as follows:

Mr. E. A. Hutchins, for the complainant; Mr. John M. Bowers, for defendant Fry, and Mr. John E. Parsons, for defendants Laborde and Reynes, assignees of C. Cavaroc & Son.

211 I have taken and carefully considered all the evidence that has been offered, and the same is herewith reported, together with the accounts presented by defendant Fry and the written exceptions filed thereto by respective counsel.

I find and report therefrom as follows:

First. That on the 19th day of December, A. D. 1882, there was due for principal and interest, as the balance of the account of Cavaroc & Son with the firm of Frederick Schuchardt & Sons, the sum of $25,715.22.

That in arriving at that amount I have adopted the schedule mark of Defendants' Exhibit B, which is annexed and made part of this report.

Objections were made to the rate of interest as shown in that schedule, but it appears from Mr. Leupp's testimony (page 41, answer to question 1) that 7 per cent. was charged on all balances against Cavaroc & Son, and in the absence of evidence to the contrary it must be presumed that this was by agreement of the parties, and that rate should govern during the time that it was permitted by the laws of this State.

Second. I find and report that on the 19th day of December, A. D. 1882, there was due for principal and interest, on the balance of the account of the National Banking Association of New Orleans with the firm of Frederick Schuchardt & Sons, the sum of $184,875.90.

I believe this sum to be accurately computed, but, for the purposes of this reference, I have not considered it necessary to compute this account or strike a balance absolutely correct, it being sufficient to know beyond peradventure that the balance of said account is in excess of $100,000. How much in excess to a penny cannot be material.

The statement of that account is as follows:

212 It appears that the defendant proved in bankruptcy against the New Orleans Banking Association by the Schuchardts on—

1883, October 14, was		$195,315 63
1879, April 18, received 50 % dividend	$97,657 82	
1880, April 2, " 5 % "	9,765 78	
		107,423 60
		$87,892 03
Interest on principal up to first dividend, 7 %		76,867 55
Interest on difference after 1st dividend to January 1st, 1880, 7 %		4,804 22
Interest on difference from January 1st, 1880, to 2d dividend, 6 %		985 70
Interest on this difference after 2d dividend to December 19th, 1882, 6 %		14,326 40
Total amount due December 19th, 1882		$184,875 90

There is an apparent conflict of opinion between the respective counsels as to the rate at which interest should be computed on this indebtedness, but whether computed at 5 per cent. or more the balance on the date named would be in excess of $100,000.

In this connection I have not taken into consideration the collections of interest made at various times on the bonds pledged as se-

curity, because I do not consider from the language of the decree and the opinion of the court that such payments have any place in that computation.

I understand the court as deciding that if there was due and owing from said banking association, after deducting the dividends paid by the assignee in bankruptcy, the sum of $100,000 that amount could be enforced against the bonds deposited as security.

Third. I find and report that on December 19th, 1882,
213 there was due on and enforceable out of the bonds in question the sum of $29,767.83, which amount is arrived at as follows:

In the matter of the New Orleans Banking Association there is due		$100,000 00
In the matter of Cavaroc & Son		25,715 22
Total		$125,715 22
On which should be credited as follows:		
Amount shown in Exhibit B, with interest to December 19th, 1882	$28,390 48	
Amount collected as per schedule of Fry's sup. ac., less the expenses stated therein and hereby allowed	67,556 91	
		95,947 39
Amount due		$29,767 83

Counsel for defendant Fry insists that to the $100,000 there should be added interest, but this position I do not think tenable, for the reason that it would be enlarging the contract of the parties and very largely increasing the lien on said bonds, which the parties fixed at $100,000. It nowhere appears from the evidence before me that the delay in settling up this matter was caused by any act of the owners of the bonds in question. The securities were at all times in the possession and control of the party or estate to be protected, and it nowhere appears that the delay in settling and adjusting the account in question is due to anything done or omitted to be done by the owners of the bonds herein hypothecated. The bonds were originally pledged to protect Schuchardt & Sons to the extent of $100,000, and until the final settlement of the estate in bankruptcy of the said association it cannot be definitely ascertained how much over and above the dividends paid will be due.

The facts presented and the reasons urged are not sufficient, in my opinion, to warrant a finding that interest upon the amount for which the bonds were pledged should be added thereto.

214 There are several matters brought out by this reference which I deem it my duty to mention in this report for the information of the court, even though I am not required so to do in the decree.

First. There is now in judgment at New Orleans in a suit brought

by defendant Fry a large amount of money representing interest on the bonds in question.

Second. Through the oversight, inadvertence, or omission of the custodian of the said bonds to demand the payment of interest and to seasonably institute suits therefor a question is pending in the courts in Louisiana as to whether a large amount is or is not barred by the statute of limitations. The amounts specified in these two items are shown in Schedule D of defendant Fry's supplemental account.

Third. According to the statement made by said Fry in Schedule E, another dividend is expected from the estate of said banking association.

Fourth. Defendant Fry claims a commission for his services respecting these bonds, and also a counsel fee of $2,000 in maintaining his lien thereon.

Even if the court intended me to pass upon these two questions, there is nothing before me respecting the first claim on which to base a finding other than the mere suggestion of the defendant.

There was no objection respecting the claim for $2,000 counsel fee on the ground that the amount was excessive. The evidence offered as to the reasonableness of that sum was not disputed.

Objection, however, was made to my power under the decree to pass upon the matter, which objection I deem well taken.

All of which is respectfully submitted.

215 Counsel for the parties in interest filed objections, hereto annexed, to my draft report, which objections, upon careful consideration, I overrule, and sign the foregoing as my legal report.

Oct. 13, 1883.

JOHN A. SHIELDS,
Master, &c.

Objections of Defendant, Chas. M Fry, to Master's Final Report.

U. S. Circuit Court, Southern District of New York.

FREDERICK DUMONT *et al. vs.* CHARLES M. FRY, Trustee, *et al.*

The defendant, Charles M. Fry, makes and files these his objections to the master's draft report:

1. He objects to the second finding of said report.

2. He objects to the third finding of said report in so far as it refuses interest on the $100,000 due, for which portion of the indebtedness of the New Orleans Banking Association the bonds were held as security, and to his report in said finding that on the 19th day of December, 1882, there was only due, in the matter of the New Orleans Banking Association, $100,000.

3. He objects to the third finding of the master in so far as it reads: "It nowhere appears from the evidence before me that the delay in settling up the matter was caused by any act of the

216 owners of the bonds in question. The securities were at all times in the possession and control of the party or estate to be protected, and it nowhere appears that the delay in settling and adjusting the account in question is due to anything done or omitted to be done by the owners of the bonds herein hypothecated. The bonds were originally pledged to protect Schuchardt & Sons to the extent of $100,000, and until the final settlement of the estate in bankruptcy of the said association it cannot be definitely ascertained how much over and above the dividends paid will be due."

4. He objects to the portion of said report reading as follows:

First. There is now in judgment at New Orleans in a suit brought by defendant Fry a large amount of money representing interest on the bonds in question.

Second. Through the oversight, inadvertence, or omission of the custodian of the said bonds to demand the payment of interest and to seasonably institute suit therefor, a question is pending in the courts of Louisiana as to whether a large amount is or is not barred by the statute of limitations.

5. He objects to the master's report in so far as it reports that there was on December 19, 1882, only due and enforceable against the bonds in suit the sum of $29,767.83, and requests as a part of these his objection—

6. That the master do state and report the account as follows:

217 Amount due as of Dec. 19, 1882, as the balance of the account of Cavaroc & Son with the firm of Schuchardt & Sons, which is decreed to be secured by bonds		$25,715 22
Amount due for principal as of Jan. 12, 1874, on the account between Frederick Schuchardt & Sons and the New Orleans Banking Association, at which date the account was closed by the return of the last of the protested bills, &c., which were out at the time of their failure and on which Schuchardt & Sons were liable	$205,499 55	
The account of all dividends paid by the receiver of the New Orleans Banking Association having been taken and credited on the balance of said account over $100,000, and not having been sufficient to pay the same, the $100,000 remains unpaid and secured by said bonds. Amount, therefore, secured by bonds as of January 12, 1874	$100,000 00	
Interest to Dec. 19, 1882	59,413 70	

Making balance of account against the New Orleans Banking Association, secured by said bonds, as of Dec. 19, 1882	$159,413 70
Total gross amount for which bonds held as security by defendant Fry, as trustee, as of Dec. 19, 1882	$185,128 92

7. He requests the master to find, "I reported that the said Fry has proved by satisfactory evidence that he has paid to his counsel for sustaining his lien on these bonds in this action the sum of $2,000."

"And I further find and report that the same was a reasonable and proper charge, but whether or not the same should be allowed to him out of the proceeds in this suit I leave to the court to adjudge, reporting the facts as above."

8. He requests the master to find, "I further report that the said defendant Fry has taken all due and proper care of said bonds, and, when requested by the parties interested in the same, instituted and carried on successful suits in the State of Louisiana for the
218 recovery of unpaid coupons; that he has received and carefully kept the proceeds of such suits, in all of which he has been put to great trouble and responsibility."

9. He requests the master to find, "And I further find and report that the said bonds came into his hands involuntarily on his part, being found by him among the assets of F. Schuchardt & Sons, for whom he was appointed trustee in bankruptcy."

"And I further find and respectfully report that he thereby became an involuntary bailee and trustee of said bonds."

PLATT & BOWERS,
Attorneys for Defendant Fry.

Exceptions of Defendant, Charles M. Fry, to Master's Report.

U. S. Circuit Court.

FREDERIC DUMONT *et al. vs.* CHARLES M. FRY, Trustee, *et al.*

The defendant, Charles M. Fry, makes and files these his exceptions to the master's final report:

1st. He excepts to the second finding of said report.

2d. He excepts to the third finding of said report in so far as it refuses interest on the $100,000 due, for which portion of the indebtedness of the New Orleans National Banking Association
219 the bonds were held as security, and to his report in said finding that on the 19th day of December, 1882, there was only due in the matter of the New Orleans National Banking Association $100,000.

3d. He excepts to the third finding of the master in so far as it reads, "It nowhere appears, from the evidence before me, that the

delay in settling up this matter was caused by any act of the owners of the bonds in question. The securities were at all times in the possession and control of the party or estate to be protected, and it nowhere appears that the delay in settling and adjusting the account in question is due to anything done or omitted to be done by the owners of the bonds herein hypothecated. The bonds were originally pledged to protect Schuchardt & Sons to the extent of $100,000, and until the final settlement of the estate in bankruptcy of the said association it cannot be definitely ascertained how much over and above the dividends paid will be due."

4th. He excepts to the portion of said report reading as follows:

"First. There is now in judgment at New Orleans in a suit brought by defendant Fry a large amount of money representing interest on the bonds in question.

"Second. Through the oversight, inadvertence, or omission of the custodian of the said bonds to demand the payment of interest and to seasonably institute suit therefor, a question is pending in the courts of Louisiana as to whether a large amount is or is not barred by the statute of limitations."

5th. He excepts to the master's report in so far as it reports
220 that there was on December 19, 1882, only due and enforceable against the bonds in suit the sum of $29,767.83.

6th. He excepts to the refusal of the master to state, find, and report the account as follows:

Amount due as of Dec. 19, 1882, as the balance of the account of Cavaroc & Son with the firm of Schuchardt & Sons, which is decreed to be secured by bonds	$25,715 22
Amount due for principal as of Jan. 12, 1874, on the account between Frederick Schuchardt & Sons and the New Orleans National Banking Association, at which date the account was closed by the return of the last of the protested bills, &c., which were out at the time of their failure, and on which Schuchardt & Sons were liable	205,499 55
The account of all dividends paid by the receiver of the New Orleans Banking Association having been taken and credited on the balance of said account over $100,000, and not having been sufficient to pay the same, the $100,000 remains unpaid and secured by said bonds. Amount, therefore, secured by bonds as of Jan. 12, 1874	100,000 00
Interest to Dec. 19, 1882	59,413 70
Making balance of account against the New Orleans Banking Association, secured by said bonds of Dec. 19, 1882	159,413 70
Total gross amount for which bonds held as security by defendant Fry, as trustee, as of Dec. 19, 1882	185,128 92

7th. He excepts to the refusal of the master to report as follows,

as requested by him, viz: That the said Fry has proved by satisfactory evidence that he has paid to his counsel, for sustaining his lien on these bonds in this action, the sum of $2,000.

8th. He excepts to the refusal of the master to report as follows, as requested by him, viz: That the said defendant Fry has taken all due and proper care of said bonds, and, when requested by the parties interested in the same, instituted and carried on successful suits in the State of Louisiana for the recovery of unpaid coupons; that he has received and carefully kept the proceeds of such
221 suits, in all of which he has been put to great trouble and responsibility.

9th. He excepts to the refusal of the master to report as follows, as requested by him, viz: That the said bonds came into his hands involuntarily on his part, being found by him among the assets of F. Schuchardt & Sons, for whom he was appointed trustee in bankruptcy.

And that he thereby became an involuntary bailee and trustee of said bonds.

PLATT & BOWERS,
Solicitors for Defendant Fry.

Compl'ts' Exceptions to Master's Report.

U. S. Circuit Court.

FREDERIC DUMONT *et al. vs.* CHARLES M. FRY, Trustee, *et al.*

The complainants except to the report of John A. Shields, Esq., special master, as follows:

1. To so much of his report as charges against the said bonds the said sums of $100,000 and $25,715.22.

NOTE.—The complainants do not except that the report is not in conformity with the decision. This exception is made for the purpose of preserving the exception to the decision of the court in that regard.

2. To the omission to allow interest at six and seven per
222 cent. upon the credits allowed by the proposed report for collections from coupon moneys, and from judgments upon coupon moneys from the time that the money was collected.

Dated June 14, 1883.

EDGAR A. HUTCHINS,
Complainants' Solicitor.

U. S. Circuit Court.

FREDERIC DUMONT *et al. vs.* CHARLES M. FRY, Trustee, *et al.*

The defendant Laborde, as survivor of Reynes, excepts to the report of John A. Shields, filed herein, as follows:

1. To so much of his report as charges against the said bonds the said sums of $100,000 and $25,715.22.

NOTE.—This defendant does not except that the report is not in conformity with the decision. This exception is made for the purpose of preserving the exception to the decision of the court in that regard.

2. To the omission to allow interest at six and seven per cent. upon the credits allowed by the proposed report for collections from coupon moneys, and from judgments upon coupon moneys from the time that the money was collected, and at seven and six per cent.

223 3. To so much of the report as finds that on December 19, 1882, there was due on and enforceable out of the bonds in question $29,767.83 or any other amount.

4. This defendant does not assent to the statement that on December 19, 1882, there was due, for principal and interest as the balance of the account of the National Banking Association of New Orleans with the firm of Frederick Schuchardt & Sons, the sum of $184,875.91.

This defendant does assent that the exact amount of that balance it is not necessary to compute, but he excepts to the computation of the referee on the ground that the computation should be made at five per cent. interest.

5. This defendant excepts that the rights of the parties should be ascertained in conformity with these exceptions, and that the referee's report should be reformed correspondingly.

Dated November 1, 1883.

MAN & PARSONS,
Solicitors for Defendant Reynes and Another.

224 The complainants and defendants, Laborde & Reynes, assignees, desiring that the original account filed by defendant Fry, trustee, with their exceptions thereto be printed, the same are added, with the first part of the master's minutes heretofore omitted.

Account of Charles M. Fry, Trustee in Bankruptcy of Schuchardt & Sons, under Decree of Dec. 6th, 1882.

U. S. Circuit Court. In Equity.

FREDERIC DUMONT *et al.*
vs.
CHARLES M. FRY, Trustee, &c., *et al.*

Schedule A contains a statement of the account between F. Schuchardt & Sons and the New Orleans National Bank.

Schedule B contains a statement of the account between F. Schuchardt & Sons and Cavaroc & Son.

Schedule C contains a statement of the coupons on the New Orleans bonds in suit now uncollected, stating whether in judgment, in suit, or what their condition.

Schedule D contains a statement of other matters affecting this accounting.

CHAS. M. FRY, *Trustee.*

225 SCHEDULE A.

1873.			
Oct. 4.	Claim against New Orleans Nat'l Banking Ass'n, proved before its assignee and allowed at	$195,315 63	
	6% interest to December 1st, 1873, 1 mo. 27 days	1,855 50	
			$197,171 13
	Credit, collected 232 New Orleans city coupons, due December 1st, 1873	8,120 00	
	Balance due December 1st, 1873		$189,051 13
	6% interest to June 1st, 1874, 6 mos.	5,671 53	
	Balance due June 1st, 1874		$194,722 66
	June 1st, 1874, credit by 232 coupons	8,120 00	
	Balance due June 1st, 1874		$182,802 66
	6% interest to May 21st, 1875, 11 mos. 20 days	10,885 15	
	Balance due May 21st, 1875		$197,487 81
	Credit by 232 N. O. city coupons, collected in New Orleans May 21st, 1875, less 5 | 16 premium	8,094 70	
	Balance due May 21st, 1875		$189,393 11
	6% interest to April 18th, 1879, 3 years 10 mos. 27 days	44,412 68	
	Balance due April 18th, 1879		$233,805 79
	Credit by 50% dividend paid by receiver N. O. Nat'l Banking Ass'n on claim	97,657 82	
	Balance due April 18th, 1879		$136,147 97
	6% interest to April 2d, 1880, 11 mos., 14 days	7,805 81	
			$143,953 78
	Credit by 5% dividend paid by receiver N. O. Nat'l Banking Asso'n on claim April 2d, 1880	9,765 78	
	Balance due April 2d, 1880		$134,188 00
	6% interest to November 21st, 1882, 2 years 7 months 19 days	21,224 12	
			$155,412 12

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Credit by 5% dividend paid by receiver N. O. Nat'l Banking Asso'n November 21st, 1882			9,765 78
Balance due November 21st, 1882			$145,646 34
6% interest to December 19th, 1882, 28 days			679 70
			$146,326 04
Less collected on New Orleans judgment in coupon suit as follows:			
1882, April 24th		$20,000 00	
" May 13th		16,000 00	
" June 12th		14,000 00	
" Aug. 15th		10,000 00	
" Dec. 12th		5,000 00	
		$65,000 00	
Less exchange	$162 50		
Counsel charges	2,310 00		
		2,472 50	
			62,528 50
Balance due December 19th, 1882			$83,797 54

CHAS. M. FRY, *Trustee.*

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SCHEDULE "B."

Claim Against Messrs. Cavaroc & Son.

Secured by 232 M. New Orleans city bonds.

1874.			
Jan. 12.	To balance as per account rendered		$7,454 22
	— % interest to Dec. 6th, 1882, 8 years 10 mos. 24 days		3,980 54
1875.			
Feb. 9.	To retainer and counsel fee in suit Louisiana Nat'l Bank *vs.* F. Schuchardt & Sons		250 00
	6 % interest to Dec. 6th, 1882, 7 years 9 mos. 27 days		117 38
1876.			
Feb. 19.	To taxable costs and disbursements up to this date in action Louisiana Nat'l Bank *vs.* Schuchardt	$97 79	
	Counsel fee for services therein	250 00	
			347 79
	6 % interest to Dec. 6, 1882, 6 years 9 mos. 17 days		141 84
1878.			
Nov. 27.	To costs, disbursements, and counsel fee in action Louisiana Nat'l Bank *vs.* Schuchardt		774 20
	6 % interest to Dec. 6, 1882, 4 years 9 days		186 96

1878.		
Dec. 28.	To judgment Louisiana Nat'l Bank suit, compromised at	9,500 00
	6 % interest to Dec. 6, 1882, 3 years 11 mos. 24 days	2,270 50
1879.		
Mar. 12.	To counsel services on settling Louisiana Nat'l Bank suit	101 51
	6 % interest to Dec. 19, 1882, 3 years 9 mos. 7 days	22 96
1882.		
Dec. 19.	Amount due	$25,147 90

CHAS. M. FRY, *Trustee.*

228 SCHEDULE C.

Coupons due June 1st and December 1st, 1875, are now in suit, amounting to	$16,240 00
Coupons from June 1st, 1876, to June 1st, 1882, are in judgment. The amount of the coupons is for	105,560 00
being the amount of the principal of the coupons. Interest runs at 5 % on the face value of the coupons.	
Mandamus to compel levying tax to pay coupons from June 1st, 1876, to Dec. 1st, 1881, inclusive, with interest, has been granted—principal	89,320 00
Tax levy for principal, interest, and costs	103,287 28
Of this there has been collected by the attorneys in New Orleans who sued on the coupons	77,853 57
Balance remaining unpaid and for which tax levy ordered	25,433 71
December, 1881, coupons in judgment are	8,120 00
June, 1882, coupons in judgment are	8,120 00
December, 1882, coupons not sued and not in judgment	8,120 00
Cash remaining in hands of attorneys in New Orleans after deducting their charges, &c.	4,665 56

CHAS. M. FRY, *Trustee.*

229 SCHEDULE D.

It is expected that a further dividend of some small amount will be declared by the receiver of the New Orleans National Banking Association.

CHAS. M. FRY, *Trustee.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles M. Fry, being duly sworn, deposes and says that the preceding accounts are correct to the best of his knowledge and belief; that all moneys he has received on account of the matters therein referred to are therein credited and accounted for, and that neither

he nor anybody for his use has received, to the best of his knowledge and belief, any moneys not therein credited.

CHAS. M. FRY.

Sworn to before me this 20th day of December, 1882.

THOMAS F. KEATING,
Notary Public, N. Y. Co.

230 *Complainants' Exceptions.*

U. S. Circuit Court.

FREDERIC DUMONT *et al. against* CHARLES M. FRY *et al.*

The complainants except as follows to the account of the defendant, Charles M. Fry, as trustee, filed under the decree of December, 6, 1882:

First. To the charge in the account of the claim of $195,315.63 against the New Orleans National Banking Association, complainants insisting that no part thereof constitutes a lien upon or claim against said bonds; and, further, that — any part thereof constitutes such lien or claim the amount cannot exceed $100,000.

Second. To the appropriation by the defendant, C. M. Fry, as trustee, to his credit of the several amounts received by him from said bonds and their coupons, complainants insisting that defendant Fry, as trustee, is not entitled to any part thereof, but that he is chargeable for the same, with interest.

Third. To the appropriation by defendant Fry, as trustee, to his credit of the whole amount of the several dividends paid by the receiver of the New Orleans National Banking Association, complainants insisting that if the defendant Fry, as trustee, has a lien or claim on said bonds for $100,000 he is only entitled to such part of said dividends as is the proportion of $100,000 to the said $195,315.63.

231 Fourth. To the omission by the defendant Fry, as trustee, to credit interest on the several amounts collected on New Orleans judgments in coupon suits or to credit the amounts as of the time when they were collected.

Fifth. To all charges for counsel charges, except as the same shall be supported by competent proof.

Sixth. To the omission to credit in the account $10,500 and upwards, which the account shows to have been collected in excess of the cash stated to remain in the hands of attorneys in New Orleans, the only explanation of which is an alleged deduction for attorneys' charges, &c.

Seventh. To each and every amount charged in Schedule B of claim against C. Cavaroc & Son, complainants maintaining that no part thereof is secured by the said bonds.

Eighth. To the whole of Schedule A of the account, in that if it be assumed that defendant Fry, as trustee, has a lien and claim upon the said bonds for $100,000, which complainants dispute, by this account more than that amount is charged as due from the bonds

even with the addition of interest, and complainants except to any charge for interest thereon. By the account it appears that defendant Fry, as trustee, has already received from coupons paid in 1873 and 1874 ---------- $24,330 70
And on account of judgment ---------- 77,853 57

So that he has on hand in cash ---------- $102,188 27

If, as he asserts, the bonds are security for the last $100,000 of the indebtedness of the New Orleans National Banking Association, there can be no interest chargeable on that amount, and he has a balance on hand over that $100,000 of $2,188.27, besides in-
232 terest on the respective sums since he received them, which interest complainants insist he is chargeable with.

Ninth. And complainants further insist that any further dividends from the estate of the New Orleans National Banking Association or of C. Cavaroc & Son should be applied, with interest, in reduction of any legal claim of defendant Fry, as trustee, against the said bonds so far as necessary and that be necessary, and that he should account for the residue and for future receipts from bonds and coupons and judgments on coupons.

EDGAR A. HUTCHINS,
Compl'ts' Sol'r.

Exceptions of Assignees of C. Cavaroc & Son.

U. S. Circuit Court. In Equity.

FREDERIC DUMONT *et al.*
against
CHARLES M. FRY, Trustee, &c., *et al.*

The defendant, E. H. Reynes, as survivor of E. H. Reynes, and Francois Laborde, as assignees of C. Cavaroc & Son, except as follows to the account of the defendant, Charles M. Fry, as trustee in bankruptcy of Schuchardt & Sons, under the decree of December 6, 1882:

233 1. To the charge in the account of the claim of $195,315.63 against the New Orleans National Banking Association, this defendant insisting that no part thereof constitutes a lien upon or claim against the said bonds, and insisting further that if any part constitutes such lien and claim the amount cannot exceed $100,000.

2. To the appropriation by the defendant, Charles M. Fry, as trustee, to his credit of the several amounts received by him from the said bonds and their coupons, this defendant insisting that the defendant, Charles M. Fry, as trustee, is not entitled to any part thereof, but that he is chargeable for the same and for all further recoveries, with interest.

3. To the appropriation by the defendant, Charles M. Fry, as trustee, to his credit of the whole amount of the several dividends paid by the receiver of the New Orleans National Banking Asso-

ciation, this defendant insisting that if the defendant, Charles M. Fry, as trustee, has a lien or claim on the said bonds for $100,000 he is only entitled to such part of the said dividends as is the proportion of $100,000 to the said $195,315.63.

4. To the omission by the defendant, Charles M. Fry, as trustee, to credit interest upon the several amounts collected on New Orleans judgments in coupon suits or to credit the amounts as of the time when they were collected.

5. To all charges for counsel charges, except as the same shall be supported by competent proof.

6. To the omission to credit in the account $10,500 and upwards, which the account shows to have been collected in excess of the cash stated to remain in the hands of attorneys in New Orleans,
234 the only explanation of which is an alleged deduction of attorneys' charges, &c.

7. To each and every amount charged in Schedule B of claim against Cavaroc & Son, this defendant maintaining that no part thereof is secured by the said bonds.

8. To the whole of Schedule A of the account, in that if it be assumed that the defendant, Charles M. Fry, as trustee, had a lien and claim upon the said bonds for $100,000, which this defendant disputes, by this account more than that amount is charged as due from the bonds, even with the additions of interest.

This defendant excepts to any charge for interest upon such $100,000 in any event, claiming that if there is a lien upon the bonds for the last $100,000 of the Schuchardt claim no liability for interest can accrue until the claim matures.

9. And this defendant excepts further that any future dividends from the estate of the New Orleans Banking Association or of C. Cavaroc & Son should be applied, with interest, in reduction of any legal claim of the defendant, Charles M. Fry, as trustee, against the said bonds so far as necessary, and that he should account for the residue and for future receipts from bonds and coupons and judgments on coupons.

January 8, 1883.

MAN & PARSONS, *Att'ys, &c.*

235 DUMONT *vs.* FRY.

WALLACE, *J.:*

Although the language used in the opinion in this case, 13 Fed. Rep., 423, 427, may justify the construction which the master placed upon it, that the bonds to the extent of $100,000 were pledged as security for the debt of the banking association, or that $100,000 of the bonds were thus pledged, it was not intended to decide that this was the exact amount of the pledge.

The terms of the pledge were that the bonds then in possession of Mr. Schuchardt should be held by them as security for any advance or overdraft which might ultimately exist in the dealings of the parties to the extent of $100,000. In effect the pledge is as though it were to secure $100,000 whenever that amount might be found to

be owing. The pledge therefore carries interest as an incident of the debt. This was clearly determined by the interlocutory decree which changes the bonds into a lien to the amount of $100,000 "and interest from the date of the balance of the account." It does not affect the question that the bonds were pledged without the consent of the owner, or that the pledgor was surety instead of prin-
236 cipal debtor. The contract is not enlarged as against a surety, because it is implied in all contracts of pledge to secure a debt that interest must be paid on the debt to redeem the pledge if the debt is not paid when it matures.

2. Contrary to my first impression, the money collected by Fry is to be treated as merely a substitute for the bonds. He had no right to apply it to extinguishment of the debt, and as he did not do so is chargeable only with what it earned, which is the interest he has received on it.

3. The money collected by the Schuchardts before their bankruptcy seems to have been made by them and mingled indiscriminately with their own funds. This is, therefore, to be treated as a payment upon the debt at the time it was received.

4. Fry was not a trustee for anybody but the bankrupt estate in collecting the interest on the bonds and is not entitled to any commissions or to a counsel fee for maintaining his lien.

5. He is not liable for permitting the coupons to become outlawed, if that has happened. He has not omitted to perform any act required of him by the parties who owned the bonds. It was for them to pay the pledge or take care of their own securities.

237 6. Interest on the sum secured by the pledge is to be computed at 7 per cent. until six per cent. becomes the legal rate by the law of this State; thereafter at six per cent.

The report is recommitted to the master for correction according to the foregoing suggestions. No costs are allowed to either party as against the other upon the exceptions.

If any questions raised by the exception have been overlooked they may be printed on settlement of the order to be entered herein.

(Endorsed:) Dumont *v.* Fry. Decision, Wallace, J. U. S. circuit court. Filed Dec. 10, 1883. Timothy Griffith, clerk.

238 United States Circuit Court, Southern District of New York, Second Circuit.

FREDERICK DUMONT *et al.*

vs.

CHARLES M. FRY, Trustee, &c., Impleaded with FRANCOIS LABORDE *et al.*

This action having been brought on for hearing on the exceptions to the master's report—Mr. Edgar A. Hutchins appearing as counsel for the complainants, Mr. John M. Bowers for the defendant Fry, and Mr. John E. Parsons for the assignees of Cavaroc & Son—

and the court having duly heard and considered the matters so raised on said exceptions—

It is ordered and adjudged that the report be confirmed as to the first finding, and the said report is referred back to the master for correction in other respects as hereinafter provided.

The second and third findings of said report are sustained so far as they find that on the 19th of December, 1882, there was due and enforceable as principal against the bonds in question in the matter of the New Orleans National — Association $100,000; but it appearing to the court that the master was in error in refusing to allow interest on the said sum of $100,000—

239 It is ordered that the said report be corrected by allowing interest thereon from the 12th day of January, 1874, to the 1st day of January, 1880, at the rate of seven per cent. per annum, and from that date to the time of the final report at the rate of six per cent. per annum.

It is further ordered that the said second and third findings be further corrected in so far as they charged the said defendant Fry with "amount shown in Exhibit B, with interest to December 19th, 1882, $28,390.40, this court being of opinion that the payments of coupons amounting to $24,334.70 made to F. Schuchardt & Sons before their failure should have been then and there credited on account of the indebtedness for which they claimed to hold the bonds as collateral, and that, instead of the said Fry being charged with interest thereon at the rate the same has earned while deposited in the trust company, he should have been charged at full statutory rates, to wit, seven per cent., from the date of payment to the 1st day of May, 1880, and six per cent. thereafter.

It is further ordered and adjudged that the master is in error in his finding and report that through the oversight, inadvertence, or omission of the custodian of the said bonds to demand the payment of interest and to seasonably institute suits a question is pend-

240 ing in the courts of Louisiana as to whether a large amount is or is not barred by the statute of limitations, which amounts are shown in Schedule D of the supplemental account filed by the defendant Fry, and in so far as he reports that the said defendant Fry owed any duty in the matter or was bound to have taken any steps, this court being of the opinion that he is not liable for permitting the coupons to become outlawed, if that has happened, inasmuch as he did not omit to perform any act required of him by the parties who owned the bonds, when properly requested, and it being their duty to pay the pledge or take care of their own securities, and the finding of said report in that regard is overruled, and the master is directed to report against such charge.

It is further ordered and adjudged that the defendant Fry is not entitled to any commission for his services respecting these bonds nor to a counsel fee for maintaining his lien thereon.

It is further ordered that the said master's report is wrong and should be overruled and the exceptions sustained in so far as it reported that there was, on the 19th day of December, 1882, only due and enforceable against the bonds in suit the sum of $29,767.83.

And it is further and finally ordered that the report be recommitted to the master for correction, in accordance with this order, and that he do, after having so corrected the said report, restate the said account and report again to this court the amount due and enforceable against and to be paid out of these bonds for
241 principal and interest, in accordance with the terms and provisions of the judgment made in this action on the 6th day of December, in the year eighteen hundred and eighty-two.

WM. J. WALLACE.

SIRS: Please take notice that the order of which the foregoing is a copy will be presented to Mr. Justice Wallace, at the court-room, in the post-office building, in the city of New York, on the 19th day of December, 1883, at 11 a. m. for settlement and signature.

Yours, &c., PLATT & BOWERS,
Sol'rs — Def't Fry, Trustee.

New York, December 19, 1883.

To E. A. Hutchins, Esq., compl'ts' sol'r; Man & Parsons, Esq's, sol'rs — def'ts Laborde & ano.

(Endorsed:) U. S. circuit court, S. D. of New York. Frederic Dumont & *al.* ag'st Charles M. Fry, impl'd with Francois Laborde & *al.* Order on hearing of exceptions to master's report recommitting report to master for correction & notice of settlement. Platt & Bowers, sol'rs for def't Fry, trustee. Due service of within order and notice of settlement is hereby admitted, N. Y., Dec. 17, 1883. Man & Parsons. U. S. circuit court. Filed Dec. 21, 1883. Timothy Griffith, clerk.

242 Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT *et al. ag'st* CHARLES M. FRY, Trustee, *et al.*

To the judges of the circuit court of the United States for the southern district of New York:

By the order of the court made and entered herein on the twenty-first day of December, eighteen hundred and eighty-three, this cause was recommitted to me as master to restate the account in accordance with the instructions contained therein.

I have made the computation upon the accounts originally filed by the defendant in accordance with those instructions, and I now report as follows:

First.

The first finding of the previous report, wherein it was reported that on the nineteenth day of December, eighteen hundred and eighty-two, there was due as principal and interest as the balance of the account of Cavaroc & Son with the firm of Frederick Schuchardt & Sons the sum of twenty-five thousand seven hundred and
243 fifteen $\frac{22}{100}$ dollars, has been confirmed by the court.

Second.

I find and report that on the nineteenth day of December, eighteen hundred and eighty-two, there was due and enforceable out of the bonds in question the sum of seventy-nine thousand eight hundred and thirty-four $\frac{02}{100}$ dollars.

Such account stated in accordance with the order of December 21st, 1883, is as follows:

1874.				
Jan. 12.	Amount enforceable in the matter of the New Orleans National Banking Association			100,000 00
	Interest thereon at 7% to Jan. 1st, 1880		$41,786 10	
	Interest from Jan. 1, '80, to Dec. 19, '82, 6%		17,800 00	
				59,586 10
				159,586 10
	In the matter of Cavaroc & Son			25,715 22
				185,301 32

On which there should be credited as follows:

Received by Schuchardt—Schedule C.

1873.				
Dec. 1.	Coupons	$8,120		
	Interest, 6% & 7%, to Dec. 19, '82	4,903 12		
			13,023 12	
1874.				
June 1.	Coupons	8,120		
	Interest, 6% & 7%, to Dec. 19, '82	4,618 93		
			12,738 93	
1875.				
May 2.	Coupons	8,094 70		
	Interest, 6% & 7%, to			
244	Dec. 19, '82	4,053 64		
			12,148 34	
	Net amount received by defendant Fry as per Schedule D		67,556 91	
				105,467 30
				79,834 02

Third.

I further report that the dividends collected by the said Fry from the receiver of the New Orleans National Banking Association up to December nineteenth, eighteen hundred and eighty-two, were insufficient to pay, with interest, that portion of the indebtedness of the

New Orleans National Banking Association which was on the twelfth day of January, eighteen hundred and seventy-four, in excess of the one hundred thousand dollars secured by these bonds.

Fourth.

As directed in the order of December twenty-first, eighteen hundred and eighty-three, I find and report that defendant Fry was not bound to take any steps toward demanding the payment of interest upon said bonds as it matured or to enter suit thereon in case of non-payment, and is not liable for permitting any of the interest coupons to become outlawed if such has happened.

All of which is respectfully submitted.

Counsel for the parties in interest filed objections hereto annexed to my draft report, which objections, upon careful consideration, I overrule, and sign the foregoing as my final report.

245 Feb'y 21st, 1884.

JOHN A. SHIELDS, *Master, &c.*

(Endorsed:) U. S. circuit court, southern district of New York. Frederic Dumont *et al.* ag'st Charles M. Fry, trustee, *et al.* Master's report.

246 U. S. Circuit Court.

FREDERIC DUMONT *et al. vs.* CHARLES M. FRY *et al.*

The complainants object as follows:

1. They renew all exceptions heretofore taken by them.
2. They except to the decision of the court that the master was in error in refusing to allow interest on the said one hundred thousand dollars.
3. They except to the decision of the court that the principal sum of one hundred thousand dollars was or is due or enforceable against the bonds.
4. They except to the decision of the court in so far as it does not hold the defendant Fry liable for his omission to collect the coupons which have become barred by the statute of limitations.

247 New York, Feb. 8th, 1884.

EDGAR A. HUTCHINS,
Compl'ts' Sol'r.

(Endorsed:) U. S. circuit court. In equity. Frederick Dumont & *al. vs.* Charles M. Fry & *al.* Complainants' objections. Edgar A. Hutchins, compl'ts' sol'r, 56 Wall St., New York city. Filed Feb'y 12, 1884.

248 U. S Circuit Court.

FREDERIC DUMONT *et al.*

vs.

CHARLES M. FRY, Trustee, &c., *et al.*

The defendant, E. H. Reynes, as survivor of E. H. Reynes and Francois Laborde, as assignees of C. Cavaroc & Son, objects as follows:

1. He renews all exceptions heretofore taken by him.

2. He excepts to the decision of the court that the master was in error in refusing to allow interest on the said one hundred thousand dollars.

3. He excepts to the decision of the court that the principal sum of one hundred thousand dollars was or is due or enforceable against the bonds.

4. He excepts to the decision of the court in so far as it does not hold the defendant Fry liable for his omissions to collect the coupons which have become barred by the statute of limitations.

February 8, 1884.

249 MAN & PARSONS, *For Reynes.*

(Endorsed:) U. S. circuit court. In equity. Frederick Dumont & *al. vs.* Charles M. Fry & *al.* Copy. Objections. Man & Parsons, att'ys for Reynes, 56 Wall St., N. Y. Filed Feb'y 12, 1884.

250 U. S. Circuit Court. In Equity.

FREDERIC DUMONT *et al.*

vs.

CHARLES M. FRY, Trustee, &c., *et al.*

The defendant, E. H. Reynes, as survivor of E. H. Reynes and Francois Laborde, as assignees of C. Cavaroc & Son, excepts as follows:

1. He renews all exceptions heretofore taken by him.

2. He excepts to the report of Master Shields, dated February 21, 1884, so far as it holds that on December 19, 1882, there was due and enforceable out of the bonds $79,834.02.

He insists that no amount is due or enforceable out of the bonds, and that, on the contrary, the defendant Fry is chargeable for all moneys received from the bonds or their coupons, with interest.

3. He excepts and insists that if the bonds are held for any amount he should be credited upon such amount a *pro rata* of all amounts received from the bonds or their coupons by the Messrs. Schuchardt or the defendant Fry.

251 4. He excepts to the fourth finding of the master's report.

Dated February 26, 1884.

(Endorsed:) U. S. circuit court, southern dist. of New York. In equity. Frederic Dumont *et al.* against Charles M. Fry, trustee, &c.

Exceptions to master's final report. Man & Parsons, att'ys — def't, E. H. Reynes, &c., 56 Wall St., N. Y. U. S. circuit court. Filed Feb. 6, 1884. Timothy Griffith, clerk.

252 U. S. Circuit Court.

FREDERICK DUMONT *et al.*
vs.
CHARLES M. FRY, Trustee, &c., *et al.*

The complainants except as follows:

1. They renew all exceptions heretofore taken by them.

2. They except to the decision of the court that the master was in error in refusing to allow interest on the said one hundred thousand dollars.

3. They except to the decision of the court that the principal sum of one hundred thousand dollars was or is due or enforceable against the bonds.

4. They except to the decision of the court in so far as it does not hold the defendant Fry liable for his omission to collect the coupons which have become barred by the statute of limitations.

5. They except to the master's report so far as it holds that on December 19th, 1882, there was due and enforceable out of the bonds $79,834.02. They insist that no amount is due or enforceable out of the bonds.

6. They except and insist that they should be credited upon
253 the one hundred thousand dollars *pro rata* of all amounts received by the Messrs. Schuchardt or the defendant Fry,

7. They except to the fourth finding of the master.

New York, Feb. 26th, 1884.

EDGAR A. HUTCHINS,
Compl'ts' Sol'r.

(Endorsed:) U. S. circuit court. In equity. Frederick Dumont & *al. vs.* Charles M. Fry & *al.* Complainants' exceptions. Edgar A. Hutchins, compl'ts' sol'r, 56 Wall St., New York city. U. S. circuit court. Filed Feb. 23, 1884. Timothy Griffith, clerk.

254 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-four:

Present: The Honorable William J. Wallace, circuit judge.

FREDERIC DUMONT *et al.*
against
CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons, Francois Laborde, and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

This action having been brought on for hearing on exceptions to

the master's report, to whom it was referred by the interlocutory decree heretofore made in this action to take and state an account of what might be due at the date of such interlocutory decree for principal and interest as the balance of the account of Cav-
255 aroc & Son with the firm of Frederick Schuchart & Sons, and also to take and state an account of what might be due at the date of said interlocutory decree for principal and interest as the balance of the account of the National Banking Association of New Orleans with the said firm of Schuchardt & Sons:

Now, on hearing Mr. John M. Bowers on behalf of the defendant, Charles M. Fry, as trustee in bankruptcy for F. Schuchardt & Sons; Mr. Edgar A. Hutchins for the complainants, and Mr. John E. Parsons for the defendant, E. H. Reynes, as surviving assignee of Charles Cavaroc & Son, bankrupts—

It is adjudged and decreed that the said Charles M. Fry, trustee as aforesaid, holds the 232 bonds of the city of New Orleans, which are the subject-matter of this action, each of which is for one thousand dollars, with the interest coupons thereto attached, under the following lien and hypothecation, namely:

First. For the payment to the said Charles M. Fry, trustee as aforesaid, of the balance due from the firm of Cavaroc & Son to the firm of Frederick Schuchardt & Sons, which amounts, with interest computed to the 19th day of December, 1882, to the sum of----	$25,715 22
Second. For the payment to the said Charles M. Fry, trustee as aforesaid, of the unsecured and uncovered balance of the account of the New Orleans
256 National Banking Association with Frederick Schuchardt & Sons to the extent of $100,000, with interest to the 19th day of December, 1882, which amounts to----------	159,586 10
Amounting in all to ----------	$185,301 32

Which is the amount for which the said Fry is entitled to assert and enforce his lien in this action, with interest thereon from the said 19th day of December, 1882.

It is further ordered, adjudged, and decreed that the firm of Frederick Schuchardt & Sons received prior to the time of their bankruptcy the following payments on account of the coupons attached to said bonds, namely:

1873, Dec. 1----------	$8,120 00
1874, June 1 ----------	8,120 00
1875, May 1----------	8,094 70
Interest to Dec. 19, 1882----------	13,575 69
Amounting in all to ----------	$37,910 39

Which, it is adjudged, is chargeable against and to be deducted from the amount of the aforesaid lien,

leaving as the amount remaining due the said Fry and secured by the pledge of the aforesaid bonds... 147,390 93

It is further ordered, adjudged, and decreed that the said Charles M. Fry, as such trustee as aforesaid, did, at the request of the parties to this action,
257 institute actions in the courts of the State of Louisiana to recover against the city of New Orleans on the various coupons on the aforesaid bonds falling due after June, 1875, which actions have resulted in the collection of considerable amounts of said coupons, and in the course of which actions said Fry was put to considerable charges and expenses, and the proceeds of which collections as made were deposited by the said Fry in the bank of New York National Banking Association, where interest was allowed on such deposits.

It is further ordered, adjudged, and decreed that the total amount of such collections and interest allowed thereon by said bank, after deducting all costs and charges properly applicable thereto, amounted as of the 19th day of December, 1882, to ---------- 67,556 91

Which it is adjudged shall now be paid to the said Charles M. Fry on account of his aforesaid lien against the bonds which are the subject-matter of this action, and which said sum of $67,556.91, being now and by this decree adjudged to belong to the said Charles M. Fry, trustee as aforesaid, reduces the amount of his lien against the bonds which are the subject-matter of this action to ---------- 79,834 02

258 With interest on $147,390.93 from the 19th day of December, 1882, at six per cent.

And it is further ordered, adjudged, and decreed, and this court, by virtue of the power and authority vested in it, does hereby order, adjudge, and decree, that the aforesaid bonds, to wit, 232 bonds of the city of New Orleans, for the sum of one thousand dollars each, now in the possession of the defendant, Charles M. Fry, trustee as aforesaid, or so much thereof as may be necessary to pay his aforesaid lien, with interest and costs, be sold at public auction at the exchange sales-rooms, at the city of New York, by and under the direction of John A. Shields, Esq., as master, hereby appointed for such purposes.

It is further ordered, adjudged and decreed that such sale take place on three weeks' public notice, to be advertised in two daily papers published in the city of New York twice in each week; that such number of said bonds as may be sufficient to pay the aforesaid claim, with interest and costs and the expenses of such sale, including the costs of the defendant Fry in this action as herein adjudged, be sold.

That out of the proceeds of such sale said master do pay to the said Charles M. Fry, trustee as aforesaid, the amount of his aforesaid lien, to wit, the sum of seventy-nine thousand eight hundred

and thirty-four $\frac{2}{100}$ dollars, with interest at six per cent. from the nineteenth day of December, eighteen hundred and eighty-two, on one hundred and forty-seven thousand three hundred and
259 ninety $\frac{93}{100}$ dollars, and that he also deduct his fees and expenses for such sale, and that he do in the next place, out of said proceeds, pay to Platt & Bowers, the attorneys for the defendant Fry, for their costs and disbursements in this action, the sum of $878.98, at which sum such costs and disbursements are hereby adjusted.

And it is further ordered, adjudged, and decreed that the said defendant Fry, trustee as aforesaid, do, for the purpose of enabling the master to make the aforesaid sale, deliver unto the said master, at the time and place of sale, such number of said bonds as the said master may sell.

It is further ordered, adjudged, and decreed that the said Charles M. Fry do deliver and pay the balance of said bonds and any moneys that may have come into his hands, less his necessary expenses in collecting the same, as the proceeds of coupons on said bonds or interest on such proceeds; and also all detached coupons, if any, and all claims and judgments on coupons, and the benefit of all proceedings for the collection of coupon moneys and all moneys which have been collected by the said Charles M. Fry and have not been previously accounted for, with interest thereon, to Edgar A. Hutchins, the attorney for the complainants, and Man & Parsons, the attorneys for the defendant, E. H. Reynes, surviving assignee of Charles Cavaroc and Son, upon the joint receipt of said attorneys, who are to divide the same between those parties in the proportion of seventy-four per cent. to the complainants
260 and twenty-six per cent. to the defendant, E. H. Reynes, as surviving assignee of Charles Cavaroc and Son, in pursuance of a stipulation between those parties signed by their respective attorneys and filed herewith, but the said defendant Fry has nothing to do with such application by said attorneys.

And it is further ordered, adjudged, and decreed that the master do dispose of any balance arising from the aforesaid sale by paying the same over to the aforesaid attorneys for the complainants and E. H. Reynes, as surviving assignee of Charles Cavaroc and Son, to be disposed of by said attorneys, as herein provided, concerning the funds adjudged to be paid them by the said Fry.

And it is further ordered that any of the parties to this action may apply to this court on the footing of this decree for further directions in the premises.

WM. J. WALLACE.

The within decree is correctly engrossed as settled by Judge Wallace.

New York, March 5th, 1884.

MAN & PARSONS,
For Reynes.

EDGAR A. HUTCHINS,
Compl'ts' Sol'r.

(Endorsed:) U. S. circuit court, second circuit, southern district of New York. Frederick Dumont *et al.* against Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons *et al.* Decree. Platt & Bowers, solicitors for def't, Charles M. Fry, trustee. U. S. circuit court. Filed Mar. 10, 1884. Timothy Griffith, clerk.

261 Circuit Court of the United States for the Southern District of New York.

FREDERICK DUMONT *et al.*
ag'st
CHARLES M. FRY, Trustee, &c., Impleaded with FRANCOIS LABORDE & *al.*

The defendant, Charles M. Fry, excepts to the refusal of the court and master to allow him commissions for his services in caring for the bonds in suit and collecting by legal proceedings the coupons due thereon.

Also the refusal of the court to allow him the charges of his counsel for sustaining and defending his lien on said bonds.

Also to the ruling of the court and of the master charging against his lien on said bonds the amount of the coupons collected by Schuchardt & Sons before the bankruptcy, with interest at 7 per cent. thereon to January 1, 1880, and thereafter at six per cent.

PLATT & BOWERS,
Solicitors for Def't, Charles M. Fry, Trustee, &c.

(Endorsed:) Circuit court of the United States for the southern district of New York. Frederic Dumont & *al.* ag'st Charles
262 M. Fry, trustee, &c., impl'd with Francois Laborde & *al.* Exceptions of def't, Charles M. Fry, trustee, &c. Platt & Bower, sol'rs for def't Fry, tr., &c., 54 Wm. St., N. Y. U. S. circuit court. Filed Apr. 7, 1884. Timothy Griffith, clerk.

263 U. S. Circuit Court, Southern District of New York.

FREDERIC DUMONT, Plaintiff,
vs.
CHARLES M. FRY, Trustee, &c., and Others, Defendants.

To the circuit court of the United States for the southern district of New York:

I, John A. Shields, the master appointed by the final decree herein to sell the two hundred and thirty-two bonds of the city of New Orleans which were the subject-matter of the action or so much thereof as might be necessary to pay the lien adjudged by said decree in favor of the defendant Fry as trustee, do report that I caused said sale to be advertised in two daily papers published in the city of New York twice in each week for three weeks before the sale, and that on the fifth day of April, 1884, at the Merchants' Exchange sales-room, in the city of New York, I sold (92) ninety-two of said

bonds, which realized an amount sufficient to pay the aforesaid lien of said Fry, with his costs, as adjusted in this action by the final judgment and the expenses of the sale.

264 I do further report that due notice of the sale was given to all parties to this action and the sale was further advertised in several of the New York daily papers and two newspapers published in the city of New Orleans and the notices sent to every P. O. box in the general post office at the city of New York, and at the time and place of sale the proposed terms thereof were submitted to all parties and amended at the suggestion of the complainant and the defendant Reynes, as surviving assignee, &c.

I sold ninety-two of the bonds, that number realizing an amount sufficient to pay the lien of the defendant Fry, his costs and the expenses of the sale.

Schedule "A," hereto annexed, contains a statement of the sales.

Schedule " B," hereto annexed, contains a statement of the payments made by me out of said funds.

I charge myself as follows—

Proceeds sale, as per Schedule "A"	$95,045
I credit myself with Schedule " B "	92,886 53
Leaving balance in my hands of	$2,158 47

Subject to the allowance of my fees as the same may be fixed by the court.

Dated New York, April 25th, 1884.

JOHN A. SHIELDS, *Master, &c.*

265 SCHEDULE "A."

Sold to—			
J. L. Brownell and Co.	$10,000	103¼	$10,325
	10,000	103	10,300
	10,000	103¼	10,325
	10,000	103¼	10,325
	10,000	103¼	10,325
	$50,000		$51,600
John R. Manning	10,000	103¼	10,325
	10,000	103¼	10,325
	10,000	103¼	10,325
	2,000	104¼	2,085
	$32,000		$33,060
J. H. Kratzenkern	2,000	103¼ 2,065	2,065
Aaren and Rheinstein	8,000	104 8,320	8,320
	$92,000		$95,095

Dated New York, April 25, 1884.

JOHN A. SHIELDS, *Master, &c.*

266 SCHEDULE "B."

1884.

April 9.	Paid Henry Meigs, Jr., for circulars, voucher 1	$65	00
	" John F. B. Smyth, auctioneer's fees & adv'ts, voucher 2	333	00
	" W. H. Lenppis, services, voucher 3	150	
	" N. Y. Times, $33.60; Daily Register, $11.75; Davis and Corson, $2, voucher 4	47	35
	" Platt & Bowers, bill of costs, voucher 5	878	98
	" Chas. M. Fry, trustee, as per decree, voucher 6	91,366	85
	" Rouse and Grant, advertising in New Orleans	45	35
		$92,886	53

Dated New York, April 25th, 1884.

JOHN A. SHIELDS, *Master, &c.*

267 NEW YORK, *Ap'l 1st*, 1884.

John A. Shields, master.

Sales of N. O. bonds to Henry Meigs, Jr., & Co., Dr., stationers and printers, 26 Exchange Place & 26 William street; engraving and lithographing.

M'ch 28.	4,000 circulars N. O. bonds printed; 4,000 envelopes, No. 5	$19	00
	To folding & enclosing	6	00
		$25	00
	To 4,000 1-cent stamps	40	
		$65	00

Received payment,

HENRY MEIGS, JR., & CO.

268 John F. B. Smyth, auctioneer and real estate broker, office A, Trinity building, No. 111 Broadway.

NEW YORK, *April 5th*, 1884.

Messrs. Platt & Bowers to John F. B. Smyth, Dr.

To services as auctioneer in matter of sale of New Orleans city bonds, John A. Shields, master.

Ninety-two bonds, par value	$92,000	
Commission, ¼		230 00

Disbursements:

11 knock-downs	$11 00	
Adv. in Herald	15 75	
" "	15 75	
" "	15 75	
" Sun	14 00	
" Times	8 75	
" World	8 00	
" Journal of Commerce	14 00	
		103 00
		333 00

Rec'd payment,

JOHN F. B. SMYTH, *Auctioneer.*

269 United States Circuit Court for Second Circuit, Southern District of New York.

FREDERIC DUMONT *et al.*

vs.

CHARLES M. FRY, Trustee in Bankruptcy of Fr. Schuchardt & Sons *et al.*

Received, New York, 8th April, 1884, of John A. Shields, master, one hundred and fifty dollars, in full of services rendered in sale and accounting of proceeds $92,000 N. O. city bonds, sold at 111 Broadway 5th April, 1884, as per decree rendered.

$150. WM. H. LEUPP.

(Endorsed:) Voucher 3. Wm. H. Leupp, $150. Services.

270 NEW YORK, *M'ch 15th*, 1884.

Messrs. Platt and Powers to "The New York Times," Dr.

For advertising master's notice of sale, 28 lines, 6 times, matter Frederic Dumont, &c., M'ch 15, 18, 21, 25, 28, Ap'l 1 ---------- $33 60

Received payment,

H. L. DYER,
For THE NEW YORK TIMES,
52 & 54 *William St.*

(Stamp.)

Master's Notice of Sale.

Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and others
against
CHARLES M. FRY, Trustee in Bankruptcy of Frederick Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

By virtue of a final decree made in the above-entitled action by the circuit court of the United States for the southern district of New York, dated the fifth day of March, 1884, I, the undersigned, the master therein appointed for such purpose, will sell at public auction, at the exchange sales-room, number 111 Broadway, in the city of New York, on Saturday, the fifth day of April, 1884,
271 at 12 o'clock, noon, by John F. B. Smyth, auctioneer, two hundred and thirty-two (232) bonds of the city of New Orleans, for one thousand dollars, $1,000, each, dated June 1, 1870, due June 1, 1895, bearing seven per cent. interest, issued under act of Legislature, approved March 16th, 1870, to provide for extinction of the floating debt of the city of New Orleans. Coupons, due June 1, 1884, attached.

Dated New York, March 14, 1884.

(Signed) JOHN A. SHIELDS, *Master.*

PLATT & BOWERS,
Attorneys, 54 William St., New York.

mh15-2aw3ws

272 NEW YORK, *March* 18, 1884.

Messrs. Platt & Bowers to the Daily Register, No. 303 Broadway, Dr.

March 15. For advertising master's sale, Dumont *vs.* Fry--- $11 75

Received payment,

THE DAILY REGISTER,
P'r DAVID S. OWEN.

2aw3w&apl5

(Endorsed:) Daily Register. Master's sale. Dumont *vs.* Fry. March 21, 1884.

273 39 NASSAU STREET, NEW YORK, *April* 4, 1884.

In DUMONT *vs.* FRY & O'rs.

Mess. Platt & Bowers to Davis & Corson, Dr.

To 100 lithographic copies of receipts ---------- $2 00

Received payment, April 9, 1884.

DAVIS & CORSON,
Per N.

No. 18618.

274 United States Circuit Court for Second Circuit, Southern District of New York.

FREDERIC DUMONT *et al.*
vs.
CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons *et al.*

Voucher No. 5.

Received, New York, 8 April, 1884, of John A. Shields, master, ninety-one thousand three hundred and fifty-six $\frac{85}{100}$ dollars, being amount adjudged to be paid me by final decree herein.

$91,366.85. CHAS. M. FRY,
Trustee of Fred'k Schuchardt & Sons.

Voucher No. 6.

Received, New York, 8 April, 1884, of John A. Shields, master, eight hundred and seventy-eight $\frac{98}{100}$ dollars, in full of costs directed to be paid us by within decree.

$878.98. PLATT & BOWERS,
Att'ys — D'f't Fry, Trustee, &c.

(Endorsed:) Vouchers Nos. 5 & 6. Chas. M. Fry, $91,366.85. Platt & Bowers, costs, $878.98.

275 IN DUMONT *vs.* FRY.

Rates of subscription: Daily, per annum, $12; half-yearly, $6; quarterly, $3. Single copies, five cents; Weekly Picayune, $2 per annum. Mrs. E. J. Nicholson, Geo. Nicholson, Nicholson & Co., proprietors. Subscriptions and advertisements payable in advance.

OFFICE OF THE PICAYUNE, 66 CAMP STREET,
NEW ORLEANS, *M'ch* 25, 1884.

Mess. Rouse & Grant to Nicholson & Co., Dr.

For advertising master's sale N. Y. 4–12 ..... $22 65

Received payment Ap'l 4, 1884.

SINCLAIR,
For NICHOLSON & CO.

All checks, drafts, post-office orders, etc., must be made payable to Nicholson & Co.

276 Folio 543.

Advertising Rates.

Daily:	
Per square (10 lines agate), 1st insertion	$1 50
Per square, each subsequent insertion	75
" position advertisements, 1st, 5th, or last page, each insertion	1 50
" each month, 1st, 5th, or last page	18 00
" each month, run of the paper	12 00

Subscription Rates.

Daily ---------- $12 00 per annum.
Weekly ---------- 1 50 "

NEW ORLEANS, *April* 1, 1884.

M. Rouse & Grant, 3½ Carondolet, to the Times-Democrat, Dr.

March 25. To advertising master's sale bonds 4–12 ---------- 22 70

Paid Ap'l 2, '84.

WM. MORAN,
For TIMES-DEMOCRAT.

Master's Notice of Sale.

Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others
against
CHARLES M. FRY, Trustee in Bankruptcy of Frederick Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

By virtue of a final decree made in the above-entitled action by the circuit court of the United States for the southern district of New York, dated the 5th day of March, 1884, I, the undersigned, the master therein appointed for such purpose, will sell at
277 public auction, at the exchange sales-room, No. 111 Broadway, in the city of New York, on Saturday, the 5th day of April, 1884, at 12 o'clock m., by John F. B. Smyth, auctioneer, two hundred and thirty-two (232) bonds of the city of New Orleans, for one thousand (1,000) dollars each, dated June 1, 1870, due June 1, 1895, bearing seven per cent. interest, issued under act of Legislature, approved March 16, 1870, to provide for extinction of the floating debt of the city of New Orleans. Coupons, due Jan. 1, 1884, attached.

Dated New York, March 14, 1884.

(Signed) JOHN A. SHIELDS, *Master.*

PLATT & BOWERS,
Attorneys, 54 William Street, New York.

mh25-tap5.

278 STATE OF NEW YORK, } ss:
City and County of New York, }

Theodore L. Pverelly, being duly sworn, saith that he is principal clerk in the office of the New York Times, a newspaper printed and published in the city of New York; that the advertisement hereto annexed has been regularly published in the said New York Times

twice a week for three weeks successively, to wit, on the 15th, 18th, 21st, 25th, & 28th days of March and April 1st, 1884.

THEODORE L. PEVERALLY.

Sworn to before me this 1st day of April, 1884.

A. H. BRADLEY,
Notary Public, N. Y. Co., 188.

Master's Notice of Sale.

Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others
against
CHARLES M. FRY, Trustee in Bankruptcy of Frederick Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

By virtue of a final decree made in the above-entitled action by the circuit court of the United States for the southern district of New York, dated the fifth day of March, 1884, I, the undersigned, the master therein appointed for such purpose, will sell at
279 public auction, at the exchange sales-room, number 111 Broadway, in the city of New York, on Saturday, the fifth day of April, 1884, at 12 o'clock, noon, by John F. B. Smyth, auctioneer, two hundred and thirty-two (232) bonds of the city of New Orleans, for one thousand dollars ($1,000) each, dated June 1st, 1870, due June 1st, 1895, bearing seven per cent. interest, issued under act of Legislature, approved March 16th, 1870, to provide for extinction of the floating debt of the city of New Orleans. Coupons, due June 1, 1884, attached.

Dated New York, March 14, 1884.

(Signed) JOHN A. SHIELDS, *Master.*

PLATT & BOWERS,
Attorneys, 54 William St., New York.

mh15-2aw3ws.

280 STATE OF NEW YORK, } ss:
City and County of New York, }

David S. Owen, being duly sworn, saith that he is the principal clerk of the publisher of The Daily Register, a newspaper printed and published in the city of New York; that the advertisement hereto annexed has been regularly published in the said The Daily Register twice a week for three weeks successively, and April 5th, 1884, commencing on the 15th day of March, 1884.

DAVID S. OWEN.

Sworn to before me this 7th day of April, 1884.
J. H. MANAHAN,
Notary Public, 125, *New York.*

Master's Notice of Sale.

Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others
against
CHARLES M. FRY, Trustee in Bankruptcy of Frederick Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

By virtue of a final decree made in the above-entitled action by the circuit court of the United States for the southern district of New York, dated the fifth day of March, 1884, I, the undersigned,
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Dated New York, March 14, 1884.
(Signed) JOHN A. SHIELDS, *Master.*

PLATT & BOWERS,
Attorneys, 54 *William Street, New York.*

m15-2aw3ws&w&a5.

(Endorsed:) Voucher No. 4. New York Times, $33.60; Daily Register, $11.75; Davis & Corson $2.00—$47.35.

282 *Master's Notice of Sale.*

Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others
vs.
CHARLES M. FRY, Trustee in Bankruptcy of Frederick Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

By virtue of a final decree made in the above-entitled action by

the circuit court of the United States for the southern district of New York, dated the fifth day of March, 1884, I, the undersigned, the master therein appointed for such purpose, will sell at public auction, at the exchange sales-room, number 111 Broadway, in the city of New York, on Saturday, the fifth day of April, 1884, at 12 o'clock, noon, by John F. B. Smyth, auctioneer, two hundred and thirty-two (232) bonds of the city of New Orleans, for one thousand (1,000) dollars each, dated June 1, 1870, due June 1, 1895, bearing seven per cent. interest, issued under act of Legislature, approved March 16th, 1870, to provide for extinction of the floating debt of the city of New Orleans. Coupons, due June 1, 1884, attached.

Dated New York, March 14, 1884.

(Signed) JOHN A. SHIELDS, *Master.*

PLATT & BOWERS,
Attorneys, 54 William Street, New York.

m15-2aw3ws&w&a5.

283 Due service is hereby admitted of a copy of the within notice.

Dated N. Y., March 17, 1884.

EDGAR A. HUTCHINS,
Compl'ts' Sol'r.
MAN & PARSON,
Solicitors — Reynes, Assignee, &c.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Frederic Dumont & *al.* ag'st Charles M. Fry, trustee, & *al.* Master's notice of sale & admissions of service. Platt & Bowers, sol'rs for def't Fry, tr.

284 *Important Sale of New Orleans City Bonds.*

Master's notice of sale.

Circuit Court of the United States for the Southern District of New York.

FREDERICK DUMONT and Others
against
CHARLES M. FRY, Trustee in Bankruptcy of Frederick Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

By virtue of a final decree made in the above-entitled action by the circuit court of the United States for the southern district of New York, dated the fifth day of March, 1884, I, the undersigned, the master therein appointed for such purpose, will sell at public auction, at the exchange sales-room, number 111 Broadway, in the

city of New York, on Saturday, the fifth day of April, 1884, at 12 o'clock, noon, by John F. B. Smyth, auctioneer, two hundred and thirty-two (232) bonds of the city of New Orleans, for one thousand (1,000) dollars each, dated June 1st, 1870, due June 1st, 1895, bearing 7 per cent. interest, issued under act of Legislature, approved March 16th, 1870, to provide for extinction of the floating debt of the
285 city of New Orleans. Coupons, due June 1st, 1884, attached.

Dated New York, March 14th, 1884.

(Signed) JOHN A. SHIELDS, *Master.*

PLATT & BOWERS,
Attorneys, 54 William Street, New York.

286 CITY AND COUNTY OF NEW YORK, *ss:*

John C. Livingston, being duly sworn, deposes and says that he is twenty-one years of age and upwards; that on the first day of April, 1884, he deposited in the general post office at the city of New York 3,915 copies of the master's notice of sale hereunto annexed, enclosed in post-paid envelopes, which notices were delivered to said general post office with instructions to deposit one in each post-office box at said general post office, and which notices were received on such undertaking by the post-office authorities.

JOHN C. LIVINGSTON.

Sworn to before me this 25 day of April, 1884.

THOMAS F. KEATING,
Notary Public, N. Y. Co.

287 U. S. Circuit Court, S. D. of New York.

FREDERIC DUMONT & *al.*

ag'st

CHARLES M. FRY, Trustee, &c., Impleaded with FRANCOIS LABORDE, & *al.*

In pursuance of the decree herein and of the annexed notice the bonds described in the annexed advertisement of sale will be sold, under the direction of John A. Shields, master, upon the following terms:

Dated New York, April 5th, 1884.

First. Ten per cent. of the purchase-money will be required to be paid to the said master at the time and place of sale, and for which his receipt will be given.

Second. The residue of said purchase-money will be required to be paid to the said master, at the Farmers' Loan & Trust Company, Nos. 20 & 22 William street, in the city of New York, on the seventh day of April, 1884, before one o'clock p. m., when the bonds will be ready for delivery.

3rd. The coupons, due June 1, 1884, are attached to said bonds.

288 5th. The biddings will be kept open after the bonds are struck down, and in case any purchaser shall fail to comply the bonds struck down to him will be again put up for sale under the direction of said master under the same terms of sale without application to the court, and such purchaser will be held liable for any deficiency there may be between the sum for which said bonds shall be struck down upon the sale and that for which they may be purchased on the resale.

JOHN A. SHIELDS, *Master.*

We have purchased under above terms of sale — following bonds:

	40	bonds,	103¼
J. L. Brownell & Co.	10	bonds,	103
H. Kratzenkern	2	" at	103¼
Aaren & Rheinstein	8	" "	
J. B. Manning, p. B. W. Samson	30	" "	103¼
" "	2	" "	104¼

289 *Master's Notice of Sale.*

Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT and Others

against

CHARLES M. FRY, Trustee in Bankruptcy of Frederick Schuchardt & Sons; Francois Laborde and E. H. Reynes, Assignees of Charles Cavaroc & Son, Bankrupts; The Louisiana National Bank of New Orleans, and N. W. Casey, Receiver of the New Orleans National Banking Association.

By virtue of a final decree made in the above-entitled action by the circuit court of the United States for the southern district of New York, dated the fifth day of March, 1884, I, the undersigned, the master therein appointed for such purpose, will sell, at public auction, at the exchange sales-room, number 111 Broadway, in the city of New York, on Saturday, the fifth day of April, 1884, at 12 o'clock noon, by John B. F. Smyth, auctioneer, two hundred and thirty-two (232) bonds of the city of New Orleans, for one thousand (1,000) dollars each, dated June 1, 1870, due June 1, 1895, bearing 7 per cent. interest, issued under act of Legislature approved March 16th, 1870, to provide for extinction of the floating debt of the city of New Orleans. Coupons, due June 1, 1884, attached.

Dated New York, March 14, 1884.

(Signed) JOHN A. SHIELDS, *Master.*

PLATT & BOWERS,
Attorneys, 54 William Street, New York.

m15-2aw3ws&w&a5.

290 (Endorsed:) U. S. circuit court, S. D. of New York. Frederick Dumont & *al. vs.* Charles M. Fry, trustee, & *al.*. Terms of sale under decree.

(Further endorsed:) U. S. circuit court, southern district of New York. Frederic Dumont ag'st Charles M. Fry, trustee, &c., and others. Master's report of proceedings under judgment. U. S. circuit court. Filed Apr. 28, 1884. Timothy Griffith, clerk.

291 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 11th day of February, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable William J. Wallace, circuit judge.

FREDERIC DUMONT *et al. versus* CHARLES M. FRY, &c.

This cause having been brought on for a final hearing upon the report of the master appointed by the decree made and entered herein on the fifth day of March, 1884, to sell the two hundred and thirty-two bonds of the city of New Orleans which were the subject-matter of this action, or so much thereof as might be necessary to satisfy the lien adjudged by said decree in favor of the defendant Fry, by which report it appears that ninety-two of the said bonds have been sold, realizing in all the sum of $95,045.00, from which sum, after satisfying the said lien and defraying all the ex-
292 penses of the said sale, exclusive of the fees of the said master, there remains in his hands a balance of $2,158.47:

Now, upon motion of Platt & Bowers, solicitors for said defendant, Charles M. Fry, it is—

Ordered, adjudged, and decreed that the said master's report of sale be, and it hereby is, in all respects confirmed.

And it is further ordered, adjudged, and decreed that out of the said sum of $2,158.47 the said master retain for his fees herein the sum of $500.00, and that the residue he pay to Edgar A. Hutchins, the attorney for the complainants, and Man & Parsons, the attorneys for the defendant, E. H. Reynes, surviving assignee of Charles Cavaroc & Son, upon the joint receipt of said attorneys, upon the trusts and for the purposes set forth in the said decree entered herein March 5th, 1884.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. Frederic Dumont *et al. vs.* Charles M. Fry, trustee, *et al.* Decree. Platt & Bowers, sol'rs — def't Fry, 54 William St., N. Y. U. S. circuit court. Filed Feb. 11, 1885. Timothy Griffith, clerk.

293 U. S. Circuit Court.

FREDERICK DUMONT *vs.* CHARLES M. FRY, Impleaded, &c,

The above is a correct transcript of records in this case, and we do not require the insertion of any further parts of the record.

New York, Oct. 10th, 1885.

PLATT & BOWERS,
Solicitors for Def't Fry.
JNO. E. PARSONS,
Solicitor for Def't Reynes.
EDGAR A. HUTCHINS,
Solicitor for Complainants.

Endorsed: U. S. circuit court. Filed Oct. 12, 1885. Timothy Griffith, clerk.

294 *Petition of Appeal.*

In the Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT, AUGUST HENRY REINE, & JEAN DAVID MOEKEL
vs.
CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons, Francois Laborde, and E. H. Reynes, as Assignee of Charles Cavaroc and Sons.

To the honorable the Supreme Court of the United States:

The appeal of Edward H. Reynes, sole surviving assignee of Charles Cavaroc & Son, one of the above-named defendants, respectfully showeth—

That upon the 14th day of June, 1877, the above-named
295 complainant filed his bill in equity in the circuit court of the United States for the southern district of New York against the above-named appellant and other defendants; on the 17th day of November, 1877, the appellant filed his answer thereto, and on the 20th day of September, 1877, the defendant Fry his answer, and on the 10th day of October, 1877, the said complainant filed his replication to the said answer.

That the cause then come on to be heard before the Honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, and on the 6th day of December, 1882, an interlocutory decree was entered, whereby it was
296 adjudged, among other things, in substance, that the firm of Frederick Schuchardt & Sons, by their trustee in bankruptcy, the said defendant, Charles M. Fry, held certain liens against the two hundred and thirty-two negotiable bonds of the city of New Orleans which are the subject of this action, and the coupons thereof and the money received from the payment of the coupons thereof,

and it was referred to a master of the said court to take and state an account of the amounts due upon the said liens.

That the said master proceeded to take and state the said account, and on the 16th day of June, 1883, he filed his report. Exceptions thereto were duly filed on behalf of the appellant, and the cause having again come on to be heard before the said Honorable
297 William J. Wallace, on the 21st day of December, 1883, an order was made and entered recom-itting the said report to the said master in accordance with the said order.

That on the 21st day of February, 1884, the said master filed his second report. Exceptions thereto were filed on behalf of the appellant, and the cause having again come on to be heard before the said Honorable William J. Wallace, on the 10th day of March, 1884, a decree was made and entered whereby it was, among other things, in substance, adjudged and decreed that the said defendant, Charles M. Fry, as trustee in bankruptcy of Schuchardt & Sons, had liens against the said bonds amounting in all to *to* the sum of $79,834.02, with interest, and a sale was ordered by the said master of
298 the said bonds or so much thereof as might be necessary to satisfy the said liens, and the payment and distribution was ordered by the said defendant Fry of the balance of the said bonds and the proceeds thereof to and among the complainant and the appellant in the proportion in the said decree directed.

That on the 26th day of April, 1884, the master's report of sale and distribution in accordance with the terms of the said decree was filed, and on the 10th day of February, 1885, the cause having again come on to be heard before the said Honorable William J. Wallace, a final decree was made and entered whereby the said master's report was confirmed and the distribution directed of the funds remaining in his hands in accordance with the terms of the decree of April 26th, 1884.

That, as the appellant is informed and believes, in the proceedings above recited errors have been committed whereby he has sustained gri-vous loss.

299 Wherefore this appellant appeals from the whole of each the said decrees of April 26th, 1884, and February 10th, 1885, of the circuit court of the United States for the southern district of New York, and respectfully prays that the said decrees of the said circuit court and each of them and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause, and that the said decrees of the said circuit court and each of them and every part thereof may be reversed and a decree made adjudicating the interest of the appellant in the said bonds as to the said Supreme Court shall seem just.

Dated September 24th, 1885.

JNO. E. PARSONS,
Solicitor and Counsel for Appellant Reynes.

300 Endorsed: U. S. circuit court, south'n dist. of N. Y. Fred-

eric Dumont *et al.* against Charles M. Fry, trustee, etc., *et al.* Petition of appeal. Jno. E. Parsons, solicitor and of counsel for appellant Reynes, No. 111 Broadway, N. Y. Within petition allowed Sept. 26, 1885. Wm. J. Wallace. U. S. circuit court. Filed Sept. 30, 1885. Timothy Griffith, clerk. Service of a copy of within petition is hereby admitted. September 26th, 1885. Platt & Bowers, solicitors — def't Fry. Edgar A. Hutchins, solicitor for pl'ff-.

301 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

FREDERIC DUMONT *et al.*
vs.
CHARLES M. FRY, *res* Edward H. Rynes, Surviving Assignee, &c., *et al.*

Know all men by these presents that we, William H. Parsons and George F. Hicks, are held and firmly bound unto the above-named Charles M. Fry, trustee, &c., in the sum of five hundred dollars, to be paid to the said Charles M. Fry, trustee; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-named Edward H. Reyns, assignee, &c., has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute the said appeal and his plea to effect and answer all if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. H. PARSONS. [SEAL.]
GEO. F. HICKS. [SEAL.]

Sealed and delivered and taken and acknowledged this 16th day of September, 1885, before me—

[L. S.]

H. B. CLOSSON,
Notary Public, N. Y. Co.

302 [Endorsed:] Vol. —, page —. U. S. circuit court. Frederic Dumont *et al. vs.* Chas. M. Fry *et al.* Bond for costs on appeal. Jno. E. Parsons, def't'-, E. H. Rynes, proctor. I hereby approve of the form of the within bond and the sufficiency of the sureties thereof. Within bond approved as to form and sufficiency of sureties Sept. 26, 1885. Filed this — day of —— 18—. Wm. J. Wallace. U. S. circuit court. Filed Sept. 26, 1885. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

CITY AND COUNTY OF NEW YORK, *ss:*

William H. Parsons and George F. Hicks, being duly sworn, do depose and say, each for himself, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

W. H. PARSONS.
GEO. F. HICKS.

Sworn to this sixteenth day of September, A. D. 1885, before me—
[L. S.] H. B. CLOSSON,
Notary Public, N. Y. Co.

303 UNITED STATES OF AMERICA, *ss:*

To Frederic Dumont, August Henry Reine, and Jean David Moekel, complainant-, and Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-five, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Edward H. Reynes, sole surviving assignee of Charles Cavaroc & Son, bankrupts, is appellant and you are appellees, to show cause, if any there be, why the judgment in the said petition of appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 24th, 1885.

WM. J. WALLACE.

304 Endorsed: U. S. Supreme Court. Frederic Dumont *et al.*, appellees, against Charles M. Fry, appellee, E. H. Reyne, appellant, *et al.* Citation. Jno. E. Parsons, sol'r for def't and app'l't, E. H. Reynes, No. 111, Broadway, N. Y. Due and timely service of a copy of the within citation is hereby admitted. September 26, 1885. Platt & Bowers, solicitors for def't Fry; Edgar A. Hutchins, solicitor for pl'ff-. U. S. circuit court. Filed Sept. 30, 1885. Timothy Griffith, clerk.

305 In the Circuit Court of the United States for the Southern District of New York.

FREDERIC DUMONT, AUGUST HENRY REINE, and JEAN DAVID MOCKEL

vs.

CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Son, and FRANCIS LABORDE and E. H. REYNES, as Assignees of Charles Cavaroc & Son.

To the honorable the Supreme Court of the United States.

The appeal of Frederic Dumont, August Henry Reine, and Jean

David Mockel, the above-named complainants, respectfully showeth—

That upon the 14th day of June, 1877, the above-named complainants filed their bill in equity in the circuit court of the United States for the southern district of New York against the above-named defendants.

On the 6th day of December, 1877, the defendants, Francis
306 Laborde & E. H. Reynes, assignees of Charles Cavaroc & Son, filed their answer thereto.

On the 20th day of September, 1877, the defendant, Charles M. Fry, filed his answer, and on the 10th day of October, 1877, the said complainants filed their replication to the said answers.

That the cause then came on to be heard before the Honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, and on the 6th day of December, 1882, an interlocutory decree was entered, whereby it was adjudged, among other things, in substance that the firm of Frederick Schuchardt & Sons, by their trustee in bankruptcy, the said defendant, Charles M. Fry, held certain liens against the two hundred and thirty-two negotiable bonds of the city of New Orleans which are the subject of this action, and the coupons thereof, and the money received from the payment of the coupons thereof, and it was
307 referred to a master of the said court to take and state an account of the amounts due upon the said liens.

That the said master proceeded to take and state the said account, and on the 16th day of June, 1883, he filed his report. Exceptions thereto were duly filed on behalf of the appellants, and the cause having again come — to be heard before the said Honorable William J. Wallace, on the 21st December, 1883, an order was made and entered recommitting the said report to the said master in accordance with the said order.

That on the 21st day of February, 1884, the said master filed his second report. Exceptions thereto were filed on behalf of the appellants, and the cause having again came on to be heard before the said Honorable William J. Wallace, on the tenth day of March, 1884, a decree was made and entered, whereby it was, among other things, in substance adjudged and decreed that the said defendant, Charles M. Fry, as trustee in bankruptcy of Schuchardt &
308 Sons had liens against the said bonds amounting in all to the sum of $79,834.02, with interest, and a sale was ordered by the said master of the said bonds, or so much thereof as might be necessary to satisfy the said liens, and the payment and distribution was ordered by the said defendant, Charles M. Fry, as trustee, of the balance of the said bonds and the proceeds thereof to and among the complainants and the defendant, Francis Laborde, as assignee, in the proportion in the said decree directed.

That on the 26th day of April, 1884, the master's report of sale and distribution in accordance with the terms of the said decree was filed, and on the 10th day of February, 1885, the cause having again come on to be heard before the said Honorable William J. Wallace, a final decree was made and entered, whereby the said master's report was confirmed and the distribution directed

309 of funds remaining in his hands in accordance with *with* the terms of the degree of March 10th, 1884.

That, as the appellants are informed and believe in the proceedings above recited, errors have been committed whereby they have sustained grievous loss.

Wherefore the appellants appeal from the whole of each the said decrees of March 10th, 1884, and February 10th, 1885, of the circuit court of the United States for the southern district of New York, and respectfully pray that the said decrees of the said circuit court and each of them, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court proceed to hear the said cause, and that the said decrees of the said circuit court and each of them and every part thereof may be reversed and a decree made as prayed in the

310 said bill with costs or such other decree as to the said Supreme Court shall seem just.

Dated September 23rd, 1885.

EDGAR A. HUTCHINS,
Solicitor and Counsel for Complainants, Appellants.

Endorsed: U. S. circuit court, southern district of New York. Frederic Dumont *et al.* against Charles M. Fry, trustee, *et al.* Petition on appeal. Edgar A. Hutchins, sol'r and counsel for compl'ts and appellants, 56 Wall St., N. Y. Allowed Oct. 7th, 1885. A. Brown. Due and timely service of within is hereby admitted. Dated Oct. 8, 1885. John E. Parsons, sol'r def't Reynes. U. S. circuit court. Filed Oct. 8, 1885. Timothy Griffith, clerk.

311 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

FREDERICK DUMONT, AUGUST HENRY REINE, and JEAN DAVID MOCKEL

vs.

CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons, *et al.*

Know all men by these presents that we, Abram L. Vanderbilt, of Norwalk, Connecticut, and Frank J. Menninger, of the city of Brooklyn and State of New York, are held and firmly bound unto the above-named Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons, in the sum of five hundred dollars, to be paid to the said Charles M. Fry, trustee, &c.; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-named Frederic Dumont, August Henry Reine, and Jean David Mockel ha- prosecuted an appeal to the Supreme Court of the United States to reverse the decrees rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named complainants shall prosecute the said appeal to effect and answer all damages and costs if they fail to make their complaint and appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. L. VANDERBILT. [SEAL.]
FRANK J. MENNINGER. [SEAL.]

Sealed and delivered and taken and acknowledged this 24th day of September, 1885, before me—

GEO. H. GRANMISS,
Notary Public, Kings Co., N. Y.

Certif. filed in N. Y. Co.

312 [Endorsed:] Vol. —, page —. U. S. circuit court. Frederic Dumont *et al. vs.* Charles M. Fry, trustee, &c., of Schuchardt & Sons, *et al.* Bond for costs on appeal. Edgar A. Hutchins, comp'ts' proctor, 56 Wall St., N. Y. The within bond approved as to form and sufficiency of sureties. Oct. 7, 1885. A. Brown. Filed this — day of ——, 18—. U. S. circuit court. Filed Oct. 7, 1885. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Abram L. Vanderbilt and Frank J. Menninger, being duly sworn, depose and say each for himself that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

A. L. VANDERBILT.
FRANK J. MENNINGER.

Sworn to this fifth day of October, A. D. 1885, before me—
[L. S.] GEO. H. GRANMISS,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

313 UNITED STATES OF AMERICA, *ss:*

To Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons; Edward H. Reynes, sole surviving assignee of Charles Cavaroc & Son, defendants, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-five, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Frederic Dumont, August Henry Reine and Jean

David Mockel are appellants and you are appellees, to show cause, if any there be, why the judgment in the said petition of appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated Oct. 7, 1885.

ADDISON BROWN.

314 Endorsed: U. S. circuit court, southern district of New York. Frederic Dumont *et al.* against Charles M. Fry, trustee, *et al.* Citation. Edgar A. Hutchins, sol'r for comp'ts and app'l'ts, 56 Wall St., N. Y. Due and timely service of within is hereby admitted. Dated Oct 8, 1885. Platt & Bowers, sol'rs for respondents. Jno. E. Parsons, sol'r — def't Reynes. U. S. circuit court. Filed Oct. 8th, 1885. Timothy Griffith, clerk.

315 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to three hundred and fourteen, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Frederic Dumont, August Henry Reine, & Jean David Mockel, complainants & appellants, against Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons, defendant & appellee, and Edward H. Reynes, sole surviving assignee of Charles Cavaroc & Son, defendant & appellant, as the same remain of record and on file in said office.

In witness whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 13th day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the said United States the one hundred and tenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 174. Edward H. Reynes, sole surviving assignee of Charles Cavaroc & Son, bankrupts, appellant, *vs.* Frederic Dumont, August Henry Reine, Jean David Mockel, and Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons. No. 175. Frederic Dumont, August Henry Reine, and Jean David Mockel, appellants, *vs.* Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons, and Edward H. Reynes, sole surviving assignee of Charles Cavaroc & Son, bankrupts. Filed October 21, 1885.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Whereas in a certain suit in said circuit court between Frederic K. Dumont, August Henry Raine, Jean David Mockel, complainants, and Charles M. Fry, trustee in bankruptcy of Schuchardt and Sons, and E. H. Reynes, sole surviving assignee of Charles Cavaroc and Sons, defendants, which suit was removed to the Supreme Court of the United States, by virtue of appeals, agreeably to the act of Congress in said case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"A certain portion of the master's minutes bearing upon a certain question heretofore filed herein by the defendant Fry."

You, therefore, are hereby commanded that searching the records and proceedings in said cause you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same together with this writ before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 3d day of January, A D. 1889.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States for the southern district of New York, by virtue of the foregoing writ of certiorari, and in obedience thereto, do hereby certify that the following pages, numbered from one to six, inclusive, contain a true and complete transcript of a certain portion of the master's minutes bearing upon a certain question heretofore filed by the defendant Fry in the case of Frederic K. Dumont, August Henry Raine, and Jean David Mockel, complainants, against Charles M. Fry, trustee in bankruptcy of Schuchardt and Sons, and E. H. Reynes, sole surviving assignee of Charles Cavaroc and Sons, defendants, as the same remains of record and on file in said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New York, in the southern district of New York, this fifth day of January, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

[Seal of U. S. Circuit Court, South. District, New York.]

JOHN A. SHIELDS, *Clerk.*

1 United States Circuit Court, Southern District of New York.

FREDERIC DUMONT *et al.*, *vs.* CHARLES M. FRY, Trustee, &c., *et al.*

Testimony taken under an order of reference to John A. Shields, Esq., dated New York, Dec. 9, 1882, 11 a. m.

Present: E. A. Hutchins, Esq., solicitor on part of complainant; and John M. Bowers, Esq., solicitor on part of defendant Fry; and Julius H. Seymour, Esq., for John E. Parsons, Esq., of counsel for defendants Laborde and Reynes, assignees of C. Cavaroc & Son.

Counsel for defendant Fry presents an account, which he states he intended to have verified, but was prevented by the absence of Mr. Fry; offers to submit it for examination, and will have verification added by return day. Counsel for complainant consents that the account be received.

Discussion over accounts had between counsel, and adjournment had to Thursday, 15th, at 11 a. m.

2 NEW YORK, *Dec. 15th*, 11 a. m.

Met pursuant to adjournment.
Present counsel as before.

Adjourned to Monday, December 18th.

NEW YORK, Monday, *December 18th*, 11 a. m.

Met pursuant to adjournment.
Present counsel as before.

Adjourned to Wednesday, December 20, at 11 a. m.

NEW YORK, *Dec. 20th*, 1882.

Met pursuant to adjournment.
Present counsel as before.

Counsel for defendant Fry presents an account, and the counsel for the complainant and the counsel for Cavaroc has until the 27th of December, 1882, to file exceptions to the same.

Adjourned to December 27th, 1882, at 11 o'clock a. m.

3 NEW YORK, *January* 8, 1883.

Present: E. A. Hutchins, Esq., solicitor on the part of complainants, and J. H. Seymour, Esq., for John E. Parsons, Esq., of counsel for defendants, Laborde, Reynes, assignee of C. Cavaroc & Son, and John M. Bowers, Esq., solicitor on part of defendant Fry.

Mr. Hutchins, on behalf of complainants, files exceptions to account of defendant, C. M. Fry, trustee, &c.

Mr. Seymour, for John E. Parsons, Esq., on behalf of assignees of C. Cavaroc & Sons, files exceptions to trustee's account.

NEW YORK, *January 10th*, 1883—11 o'clock a. m.

Met pursuant to adjournment.
Present, counsel as before.

Counsel for Mr. Fry asks for leave to withdraw the account, and

asks leave to file another account, and for leave till Monday, January 15th, 1883, and states as his reasons for making this request that he has filed the account under the impression that no objection would be taken as to its form or as to the manner of stating the payments received on the coupons of the New Orleans bond; that he considers the account filed to raise those questions.

Mr. Bowers asks whether, by the first exception, there is to
4 be any dispute that, on October 4, 1873, Mr. Fry, as trustee, did leave a claim against the New Orleans Banking Association for $195,315.63, and that it was proved before its assignee and at that amount. Counsel states that they do not dispute the fact.

At the request of counsel for Fry, trustee, the counsel for the other parties state that by their second and third exceptions they have not intended to object to the form in which the account is prepared or to any compounding of interest. They understanding that 6 per cent. is agreed as the rate of interest—no objection to be taken to compounding.

Counsel for Fry, trustee, states that as to the fourth objection he will file a supplemental account. As to the fifth and sixth objections he will file a supplemental account. At the request of Fry, trustee, the other counsel say that by their seventh exception they have not intended to raise any question of fact and make no objection of fact to the items.

At this point counsel for Mr. Fry renews his request to withdraw his account and file another in its stead.

The counsel for Mr. Reynes and Mr. Dumont state that the action on their part succeeding the original request by counsel for Fry, trustee, to withdraw his account, was on the understanding that the subject should be arranged, and the counsel for Fry, trustee, proposes now to go back to his original motion, must stand upon that and that stand upon their exceptions exactly as they read.

Counsel for Mr. Fry states that he first presented an account unsworn. On December 9th he presented an unsworn account, and submitted to counsel then present for examination; that certain suggestions were made as to reduction of interest and a waiver as to compounding of interest, schedule A being then in substan-
5 tially same form as at present; that at an adjourned meeting all the suggestions were acceded to by one side or waived by the other, and the only question left open for discussion was the amount of funds in the hands of the New Orleans attorneys, and that he understood when he filed the account that was an open question, and for those reasons he asks leave to withdraw the present account and to file another.

Mr. Hutchings, counsel for complainant, asks for leave to strike out all the preceding, except his statement of the motion.

Mr. Parsons objects to having him go over the minutes of the statements of facts made by Mr. Bowers, and he disputes their correctness.

The master denies the motion of counsel for Mr. Fry to withdraw the account already filed, but gives him leave to file a supplemental

account, the same to be produced Wednesday, 17th January, 1883, at 11 o'clock a. m.

Adjourned to Wednesday, 17th January, 1883, at 11 o'clock a. m.

NEW YORK, *January 17th*, 1883.

Present: E. A. Hutchins, Esq., solicitor for complainant, and John N. Bowers, Esq., counsel on part of defendant and Fry, Julius H. Seymour, Esq., for John E. Parsons, Esq., of counsel for defendants Laborde & Reynes, assignees of C. Cavaroc & Son.

Mr. Bowers, on part of defendant Fry, files amended and supplemental account of Charles M. Fry, trustee.

Mr. Bowers, of counsel for defendant Fry, asks that an open commission issue to the clerk of the U. S. circuit court for the
6 Louisiana district of New Orleans, to examine such witnesses as may be produced by either side concerning the charges made by Rouse & Grant for their services concerning the coupons on the bonds in suit sued on by them, or for their services in any manner connected therewith, or for any evidence bearing upon the issues raised by the accounts and exceptions thereto. Evidence to be taken upon two days' notice, to be given by Rouse & Grant, as representing Mr. Fry, to Bayne, as representing complainants, and the defendants, assignees of Cavaroc, or by Mr. Bayne to Rouse & Grant, or at such times and places as may be agreed upon by said Rouse & Grant and Mr. Bayne.

Complainants' counsel and counsel for assignees of Cavaroc consent to the above with the understanding that this consent shall not be considered a waiver of their rights to insist upon a prompt and speedy prosecution of the reference now pending before the master.

Adjourned to January 22d, 1883, at 11 o'clock a. m.

NEW YORK, *January 22d*, 1883—11 o'clock a. m.

Met pursuant to adjournment.

Present, counsel as before.

Counsel for complainant and the counsel for defendant Reynes, assignee, file their exceptions to the amended and supplemental account of the defendant Fry, trustee.

On the application of Mr. Bowers, counsel for Mr. Fry, the master adjourns this case to Monday, January 29, 1883, at 11 a. m.

H. B. Closson, of Man & Parsons, appeared. No other counsel appearing, case adjourned to Monday, February 5th, at 11 a. m.

[Endorsed:] Sup. Court U. S. Oct. term, 1888. No. 174. Edward H. Reynes, sole surv'r, &c., app't, *vs.* Frederick M. Dumont & *al.* Writ of certiorari & return. Filed Jan'y 7, 1889.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 174.

EDWARD H. REYNES, Sole Surviving Assignee of CHARLES CAVAROC & SON, Bankrupts,

Appellants,

vs.

FREDERIC DUMONT, AUGUST HENRY REINE, JEAN DAVID MOCKEL; and CHARLES M. FRY, Trustee in Bankruptcy of SCHUCHARDT & SONS.

No. 175.

FREDERIC DUMONT, AUGUST HENRY REINE and JEAN DAVID MOCKEL,

Appellants,

vs.

CHARLES M. FRY, Trustee in Bankruptcy of SCHUCHARDT & SONS; and EDWARD H. REYNES, Sole Surviving Assignee of CHARLES CAVAROC & SON, Bankrupts.

APPELLANTS' BRIEF.

JNO. E. PARSONS,

Of Counsel.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1888.

EDWARD H. REYNES, Sole Surviving Assignee of Charles Cavaroc & Son, Bankrupts,
Appellants,

vs.

FREDERICK DUMONT, AUGUST HENRY REINE, JEAN DAVID MOCKEL and CHARLES M. FRY, Trustees in Bankruptcy of Schuchardt & Sons.

No. 174.

Brief for Appellants.

FREDERICK DUMONT, AUGUST HENRY REINE and CHARLES MOCKEL,
Appellants,

vs.

CHAELES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons, and EDWARD H. REYNES, Sole Surviving Assignee of Charles Cavaroc & Son, Bankrupts.

No. 175.

Appeals by Dumont et al. (complainants in the cause), and by the assignee of Cavaroc & Son from decrees of the Circuit Court of the United States for the Southern District of New York.

The bill was filed to ascertain and determine the interests of the parties in $232,000 of bonds of the City of New Orleans, and in coupon money received on the bonds.

The Circuit Court decreed (pp. 147, 148, 149) that, subject to certain liens in favor of the defendant Fry as trustee in bankruptcy of Shuchardt & Sons, the bonds and their proceeds belonged to the appellants. It decreed that they were to be paid over in the proportion of 74 per cent. to the complainants, and 26 per cent. to the assignee of Cavaroc & Son, they having by stipulation agreed upon that proportion of interest as between themselves (fol. 260).

The Court decreed that Fry, as the Schuchardts' trustee, had claims upon the bonds as follows:

1. A banker's lien for the Schuchardts' balance of account current against the Cavarocs, amounting with interest to December 19, 1882, to $25,715.22.

Interlocutory Decree of December 6, 1882, p. 74, fol. 133.
Decree of March 5, 1884, p. 147, fol 255.

2. A lien for $100,000, part of $195,315.63, due to the Schuchardts by the New Orleans Banking Association.

The Court decreed that the Cavarocs had pledged the bonds to secure this $100,000.

Interlocutory Decree, p. 74, fol. 134.
Decree of March 5, 1884, p. 147, fol. 256.

3. Dividends to the amount of 55 per cent. (or more) were paid by the Receiver of the bank on the entire Schuchardt debt of $195,315.63.

Master's Report, p. 126, fol. 212.

The Court decreed that the owners of the bonds were not entitled to credit for the share of the dividends, applicable to the $100,000.

Interlocutory Decree of December 6, 1882, p. 73, fol. 131.

4. To reach this result the Court decreed that the pledge was to secure *any unpaid balance* arising upon the account of the bank with the Schuchardts.

The Court further held that it was not necessary to wait until the amount of this unpaid balance was ascertained (dividends were paid in 1879 and 1880, Master's Report, fol. 212) but that the $100,000 could be treated as due back to Jan. 12, 1874, so as to run from that date with interest.

Opinion of Judge WALLACE, p. 139, fol. 235.
Order, p. 141, fol. 239.

The effect of this was to increase the $100,000 on December 19, 1882, to $159,586.10, with interest from that date.

Decree of March 5, 1884, p. 147, fol. 256.

5. Large amounts were collected by Fry as trustee of the Schuchardts from coupons.

The Court held that these amounts were not to be treated as credits as of the time that they were received, the effect of which would be to stop interest at the rate of 7% and 6% upon the Schuchardt claim, but that interest was to run at those rates upon the claim and that upon the credits it was to run only at the rate of 2½ per cent.

Opinion of Judge WALLACE, p. 140, fol. 236.
Decree of March 5, 1884, p. 148, fol. 257.

~~6. By the oversight, inadvertence or omission of Fry as trustee, the interest upon the bonds to a large amount becsme exposed to a claim that it was barred by the Statute of Limitations.~~

~~Master's Report, p. 128, fol. 214.~~

~~The Court decided that this imposed no liability upon Fry.~~

~~Opinion of Judge WALLACE, p. 140, fol. 236.~~
~~His Decree, p. 141, fol. 240.~~

The appellants, by exceptions to the Master's reports (pp. 80–82, 132–137, 132–138), and by appeal from the decrees of the Court (pp. 165, 166), maintain that in respect of the above matters the Circuit Court erred.

FIRST.

The Circuit Court erred in holding that the bonds were subject to a banker's lien in favor of the Schuchardts.

It is only upon securities or money deposited with a banker in the usual course of business that a banker's lien exists. The reason of the rule is that the advances which constitute the debt are supposed to be made upon the credit of the deposit.

The lien does not exist where an agreement, express or implied, or the conduct of the parties, is inconsistent with its assertion.

National Bank vs. Insurance Co., 104 U. S. R., pp. 54, 71.
Duncan vs. Brennan, 83 N. Y., 487.
Neponset Bank vs. Leland, 5 Metcf., 259.
Story on Agency, § 381.
Vanderzee vs. Willis, 3 Bro. Ch., 21.
Brandao vs. Barnett, 3 M. G. & S., 519.
Grant vs. Taylor, 35 N. Y. Super. Ct. Rep., 338; aff'd 52 N. Y., 627.
Wyckoff vs. Anthony, 9 Daly, 417.
Zelle vs. German, &c., Institution, 4 Mo. App., 401.

I. The bonds were not deposited with the Schuchardts by the Cavarocs in the usual course of the business done between them. Whenever they were used as security it was by special arrangement. From

first to last the Schuhardts recognized that except by special arrangement they had no claim against the bonds. They were only used by the Schuchardts in accordance with the directions of the Cavarocs. Those directions they always complied with and in a manner inconsistent with any right on the part of the Schuhardts to hold the bonds as general security.

The business of the Schuchardts was carried on at New York, that of the Cavarocs at New Orleans. The bonds originally came into the possession of the Shuchardts on September 20, 1870, from Cavaroc, Jr., in New York.

Testimony of Wells, of the Schuchardt firm, p. 52, fol. 94.

Cavaroc, Jr. sent the bonds to New York for the purpose of using them to secure a loan through the Schuchardts.

His Evidence, p. 40, fol. 72.

His testimony was that the bonds then remained with the Schuchardts for safe keeping (p. 41, fol. 73).

Wells, of Schuchardt's firm, testified that this loan was obtained from M. Morgan's Sons and on the same day, September 20, 1870, that the bonds were received. At that time there were $275,000 of the bonds. By direction of the Cavarocs, they were deposited with M. Morgan's Sons for the loan. The amount was $200,000 loaned to the New Orleans, &c., Bank, and $110,000 to the Cavarocs.

Wells further testified that upon payment of the loan, the bonds were returned to the Schuchardts; and that thereafter from time to time, always by direction of the Cavarocs, they were deposited as security for other loans either to the Cavarocs or to the Bank. One of the loans for $100,000 *was made by the Schuchardts themselves on a pledge of $160,000 of the bonds.* From time to time also bonds were delivered by the Schuch-

ardts either to the Cavarocs or to other persons by their order.

Testimony of Wells, p. 52, fol. 94.

On February 15, 1873, the bonds were pledged in writing by the Cavarocs to the Schuchardts to secure $100,000 for the New Orleans Bank upon terms hereafter to be considered.

Vide the Cavarocs letter of February 15, 1873, p. 30, fol. 54; and the answer of the Schuchardts of February 27, 1873, p. 30, fol. 54.

Wells, in answer to his own counsel, testified, in so many words, that his understanding of the matters for *which the bonds were deposited was to secure the indebtedness of the New Orleans National Banking Association to his firm* (fol. 95).

On October 9, 1873, the Schuchardts, in response to an order for the bonds given on the same day by the Cavarocs (*vide* order, p. 30, fol. 55) said (their despatch of October 9, 1873, p. 31, fol. 56), "according to your written authority *we hold New Orleans city bonds as collateral security against Bank of New Orleans.*"

This was after the rights of the parties had become fixed. The Cavarocs failed on October 4, 1873. The Bank failed on the same day.

The Schuchardts' despatch of October 9, 1873, was not only the last communication from them, it was the last act on their part relating to the bonds. It and all the evidence relating to previous occurrences show that any claim against the bonds which the Schuchardts had was by direct arrangement; that the bonds did not come into their hands in the ordinary course of the business between them and the Cavarocs; and that they themselves recognized that the only claim which they had upon the bonds was by the arrangement of

February, 1873, by which they were pledged for the New Orleans Bank.

That pledge of itself dispels any claim that the bonds were held by the Schuchardts as general security. But for that pledge the Schuchardts would have surrendered the bonds upon the demand made by the Cavarocs on October 9, 1873. Subject to such rights as that pledge conferred, the Schuchardts then recognized, as had they always theretofore recognized, that the Cavarocs could do what they chose with the bonds; and that it was only when they were specifically pledged to the Schuchardts that they had any claim upon them.

According to the authorities, under these circumstances, the bonds were not subject to a banker's lien.

Vanderzee vs. Willis, 3 Bro. Ch., 21:

Headnote: "Bankers, having securities deposited as a pledge for 1,000 *l.*, though the depositor at his death is indebted in a larger sum, have no lien further than the 1,000 *l.*"

Brandão vs. Barnett, 3 M., G. & S., 519 (House of Lords, 1846), reversing S. C. in Exchequer Chamber, 6 M. & G., 630, which reversed S. C. in Common Pleas, 1 M. & G., 908,

Lord Campbell, L. C. J.: "This judgment will leave untouched the rule that bankers have a general lien on securities deposited with them as bankers, but will prevent them from successfully claiming a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed.

Lord Lyndhurst, L. Ch.: "It was the understanding between the parties that the exchequer bills were to be returned after the interest was received, or after they were exchanged. If so, and that was the understanding—the fair inference from the transaction—it is quite clear that there could be no lien, and that the case does not come within the general rule."

Story on Agency § 381 :

"The right to retain for the general balance of accounts may be controlled by any special agreement, which shows that it was not intended by the parties ; as it may also be repelled by circumstances showing that the securities did not come into the hands of the banker or were not held by him in the ordinary course of business. Thus, for example, if securities have been deposited with a banker as a pledge for a specific sum and not as a pledge generally, that will repel the inference that they were intended to give a lien for the general account or balance between the parties."

National Bank and Insurance Co., 104 U. S., 54, 71 :

By the Court, MATTHEWS, J. : " Ordinarily that (the bankers' lien) attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion."

Neponset Bank vs. Leland, 5 Metef., 259 :

By the Court : " The notes were deposited under special circumstances ; they were not pledged generally, but specifically ; and this negatives any inference of any general lien, if, in the absence of such special agreement, the law would imply one."

Duncan vs. Brennan, 83 N. Y., 487 :

By the Court : " The general lien which bankers have upon bills, notes and other securities deposited with them for a balance due on general account, cannot, we think, exist where the pledge of property is for a specific sum and not a general pledge."

Wyckoff vs. Anthony, 9 Daly, 417, 423 :

By the Court—DALY, C. J. : " This was a specific pledge of twenty bonds, for the payment of a particular debt or note, and where securities are thus pledged to

a broker or banker to secure a particular loan or debt, he has no lien upon such securities for a general balance or for the payment of any other claim."

Grant vs. Taylor, 35 N. Y. Super. Ct. Rep. (3 J. & S.), 338; affd., 52 N. Y., 627:

By the Court: "General liens for a balance of account are not favored (2 Kent Com., p. 634). * * * The lien of a banker does not exist if there be circumstances in any case inconsistent therewith."

2. There is no equity to support the Schuchardt claim of a banker's lien:

(*a*) 74% in value of the bonds belonged to the complainants. There was no pretense that they ever authorized a pledge of the bonds.

This fact indicates that it was unlikely that the Cavarocs would deposit the bonds as their property in the ordinary course of their business with the Schuchardts. It indicates that the Cavarocs were not likely to entertain the intention that the bonds should constitute general security to the Schuchardts.

Their conduct and that of the Schuchardts corresponded with what was to be expected. The Schuchardts never relied upon the bonds as general security. The Cavarocs never did anything to constitute them general security; and whenever they were made security to the Schuchardts it was by a specific arrangement made at the time.

Wells' account of what was done with the bonds was in answer to a question from his own counsel, *asking what directions were received from the Cavarocs relative to the bonds and what transactions were made pursuant to such directions* (p. 52, fol. 94). His answer is explicit, that every transaction that occurred was special and in pursuance of the directions of the Cavarocs.

(*b*) As to the Cavaroc 26%, the controversy is not between the Cavarocs and the Schuchardts, but between

the general creditors of the two firms, represented respectively by their trustees in bankruptcy.

SECOND.

The Circuit Court erred in holding that for $100,000 of the $195,315.63 of the debt due to the Schuchardts by the New Orleans Banking Association, they had a lien upon the bonds.

The hypothecation of the bonds by the Cavarocs to the Schuchardts as security for the New Orleans Bank was in writing. It pledged the bonds for advances upon exchange purchases to the maximum amount of $100,000 until the advance should be covered by the delivery of the exchange. All the exchange was remitted to the Schuchardts and accepted by them, and the pledge became discharged. The only possible exception was the small balances hereinafter stated.

I. The pledge of the bonds was made in February, 1873.

On December 4, 1871, the Schuchardts had authorized the Bank "to draw upon us in advance of remittances to he extent of $100,000 (one hundred thousand dollars), with the understanding that such drafts are to represent exchange actually bought and paid for" (p. 28, fol. 51).

On February 11, 1873, the Schuchardts, in answer to a request from the Bank, notified its cashier that this credit (which is described as a credit *à découvert*) was predicated upon the deposit of the bonds, and that on their withdrawal the Schuchardts supposed the agreement canceled (p. 29, fol. 52).

The Bank accepted this as notice that the previous credit was canceled; and thereupon there passed between the Schuchardts and the Cavarocs the letters which constitute the agreement for the pledge.

The letter of the Cavarocs was in French. It is dated February 15, 1873.

Vide the original letter, p. 62, fol. 108.
Vide the appellants' translation, p. 29, fol. 53, and the Schuchardts' translation, p. 63, fol. 109.

The only substantial difference of translation between the parties is in the case of the word *découvert*. The appellants translate this word "uncovered," "not covered." Wells of the Schuchardt firm testified that he first translated the word "unsecured," because he considered it better English (his evidence p. 54, fol. 96); that he then turned to the dictionary and saw it "uncovered" and added that word, making his translation read "unsecured—uncovered."

If it were necessary to select one term or the other, upon this evidence the proper translation would be "uncovered." It is not necessary to do so. The context and the course of business sufficiently define the expression. Accepting the translation of the appellants, the letters read as follows:

"NEW ORLEANS, February 15th, 1873.

"Mess. Schuchardt & Sons, New York:

"In your letter of the 11th instant you say: 'The credit of $100,000 (one hundred thousand dollars), *à découvert*, was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we, of course, supposed the agreement canceled.' You know that exchange at New Orleans is purchased by making advances until such time as the drafts are delivered; and it was with view of making our mutual transactions more active that we asked this credit, "*à découvert*," at the time. In view of your remark I have nothing to say, except to authorize you to consider a portion of

the bonds belonging to my firm, which you have in your possession, as collateral security in case you should not be covered (*en cas de découvert*).

" (Signed) C. CAVAROC,
" Pres't."

" NEW YORK, February 27th, 1873.

" To the Cashier of the New Orleans Banking Association, New Orleans :

" In reply to your worthy president's letter of the 15th inst., we take pleasure in authorizing you, in accordance with the terms therein stated, to value on us, '*à découvert*,' for a sum not exceeding as maximum $100,000 (one hundred thousand dollars), against exchange purchases.

" (Signed) F. SCHUCHARDT & SONS."

It will be observed that in their letter the Cavarocs explain that exchange at New Orleans is purchased by making advances until such time as the drafts are delivered. During that period the advance is uncovered. When the exchange is actually delivered, it covers the advance.

The Schuchardts letter authorizes the bank to draw on them *in accordance with the terms stated in the* letter of the Cavarocs " *against exchange purchases.*"

The expression contained in their letter of December 4, 1871 (p. 28, fol. 51) is similar. It authorizes the bank to draw in *advance of remittances*, with the understanding that the drafts were to represent exchange actually bought and paid for.

Whichever expression is used, when the exchange was delivered to the Cavarocs and remitted by them to and accepted by the Schuchardts, the guarantee had spent itself.

2. The course of business in New Orleans, as testified to, without contradiction, by Cavaroc (p. 24, fol. 44), corresponds with the construction claimed by the appellants for the pledge.

"There is a usage and meaning (for the words *à découvert*). The words '*à découvert*' we use more frequently in French than 'credit.' If I write in French to ask an open credit to a banker I will merely ask him: 'Let me draw on you *à découvert* for one or two hundred thousand dollars.' If I say to the banker, 'I will cover you with exchange to that amount,' as soon as I cover to that amount it is finished. I don't owe a cent to that amount, *à découvert* is closed, and I have a right to go on again. It is a revolving credit. For instance, with Schuchardt suppose I draw to-day $100,000 on Schuchardt and it was *à découvert*, and the next morning or day after I send to Schuchardt $100,000 of exchange bought from different houses here, my *à découvert* is finished, it is closed. As soon as I have remitted exchange for the $100,000 draft of the day preceding the *à découvert* is closed. Schuchardt is covered then. On the same day or next morning I have a right to draw $100,000 and cover again. As soon as I have remitted $100,000 exchange I have a right to draw again. Therefore, when the bank remitted exchange to cover what the bank had drawn under that credit, *à découvert*, the guarantee made by me, C. Cavaroc, ceased, and the right to hold these bonds ceased under that guarantee."

And the course of dealing between the Schuchardts, the Bank, and the Cavarocs was in accordance with this construction.

On October 1, 1873, the account between the Bank and the Schuchardts was balanced, $4,121.92 being then to the debit of the Bank in currency account (p. 116), and $68,231.17 (subsequently reduced to $14,-691.05, p. 118) in gold (p. 115, fol. 194). All the advances which up to that time had been made by the Schuchardts had been covered by the remittance of drafts, except these balances:

Vide testimony of Cavaroc, p. 24, fol. 45.
Vide statement by Fry as trustee, of the Schuchardts' claim, p. 101, and Fry's proof of debt against the Bank, p. 115, *et. seq.*

The residue of the $195,315.63 in excess of the $4,-121.92 currency and $14,691.05 gold was made up of drafts which had been received from the Bank, had been credited in account by the Schuchardts, forwarded to Europe, and which, being there protested, they then charged back with 10 per cent. damages to the Bank and claim to be protected by the pledge up to the amount of $100,000.

Vide supra.

3. The construction put upon the pledge by the Circuit Court:

Vide Judge WALLACE'S opinion, p. 68, fol. 120 *et. seq.*,

makes the bonds liable without limit of time, for the ultimate outcome of transactions to an enormous and indefinite amount.

The transactions for September, 1873, amounted to $688,459.13 (Fry's witness Leupp., p. 56, fol. 99).

This was not at all the understanding. The agreement for the pledge made the bonds security for drafts not exceeding, as *maximum*, $100,000, advanced against exchange purchases. The security continued until the drafts were delivered. This was definite as to time and amount. It permitted the Bank to overdraw up to a maximum of $100,000. As soon as this overdraft was covered by the remittance of the exchange it permitted the Bank again to overdraw to the same amount. That was all.

But to permit the Schuchardts to charge back exchange which they had accepted, in the event of its protest, was to expose the bonds to a hazard not at all contemplated or made part of the pledge. It might make them liable for the failure of payment of exchange to the amount of many millions instead of uncovered drafts against purchases of exchange subsequently to be remitted to the maximum limit of $100,000.

4. The pledge being in writing, the rights of the parties depend upon the construction which the letters of February, 1873, require.

On September 20, 1873, there was a meeting of the directors of the Bank, at which Cavaroc, who was president, was present. A resolution was passed in these words:

"Resolved, That in view of securing the president against any eventual loss of the 7 per cent. City of New Orleans bonds belonging to the firm of C. Cavaroc & Son and actually pledged to Messrs. F. Schuchardt & Sons, agents of the Bank of New York, as collateral security for the payment of all foreign exchange bills entrusted to their care for negotiation and by them endorsed, that he be and is hereby authorized to select as guarantee from the portfolio of the Bank such papers as he may think proper to the extent of one hundred thousand dollars."

Cavaroc did not vote for the resolution. He was present and may be assumed to have assented to the resolution. Its language is broader than the terms of the pledge. But the resolution cannot change the effect of the pledge, nor can it operate by way of estoppel. There is no evidence that under the resolution the Cavarocs received any security from the Bank.

At the same meeting a resolution was passed thanking the Cavarocs for leaving undisturbed a cash balance of $80,000 to their credit on the books of the Bank. This makes it unlikely that the Cavarocs did avail of the resolution.

They had no legal right to do so. The Bank was a National bank. It could not in this way create a preference or give security.

It was quite suitable that the Cavarocs should be secured by the Bank, even in terms broader than the pledge, so as to protect them against any *claim* that the Schuchardts might make. However this may be,

the language of the resolution neither did nor could enlarge the effect of the pledge. All that needs to be said in respect of the resolution is, that it did not undertake to enlarge the pledge. What legal effect is to be given to the pledge depends upon the construction to be put upon its language.

5. So far as the Cavarocs are concerned, their position has been consistent throughout.

On October 9, 1873, they demanded the bonds (p. 35, fol. 64). On October 11, 1873, on receiving the Schuchardts' despatch that they claimed to hold them as collateral security against the New Orleans Bank, the Cavarocs wrote at length referring to the correspondence and insisting that the exchange which the Schuchardts had accepted, and for which they had given credit in account current, covered the advances and discharged the pledge.

Vide pp. 36, 37.

6. If the subsequent conduct of the parties could vary the pledge, it is the Schuchardts who are proved to have acted in accordance with what the appellants claim to be the rights of the parties.

For 200,000 francs of the exchange in question the Schuchardts claimed that Dumont & Co., the complainants, were liable as drawees.

For that amount Fry, on January 3, 1874, commenced suit in the New York State Supreme Court, and issued an attachment against any interest which the Dumonts (complainants) might have in the bonds—a wholly useless proceeding if the Schuchardts held the bonds as security for the exchange.

Testimony of Boswell, lawyer, and a witness for the Schuchardts, p. 51.

7. The bonds are not liable for the Schuchardts' claim of $195,315.63 or for $100,000, or any part of it,

for the reason that it was a condition of the pledge that the bank might value on the Schuchardts "for a sum not exceeding as *maximum* $100,000."

It is not claimed that this was not a continuing guarantee. The appellant's contention is that it protected drafts for advances up to the amount, at one time, of $100,000 and no more. If the contention for the Schuchardts as to the construction and effect of the pledge is correct, the bonds were liable not for drafts for a maximum sum of $100,000, but for drafts for a sum without limit. In that case the Schuchardts by departing from the terms of the pledge in a way which materially increased the risk to the Cavarocs, released their liability.

That action by a party secured which increases the hazard of the surety, discharges the security, is well settled.

Chitty on Contracts, p. 461.

To permit the exchange to exceed $100,000 outstanding at any one time would, if the contention for the Schuchardts be correct, make the bonds liable for all those transactions. This would expose them to the risk not of transactions to the amount at any one time of $100,000, but of $688,459.13 for September, 1873, alone, the month which includes the exchange, the non-payment of which creates the Schuchardt claim of $195,315.63.

Furthermore, if the indebtedness of the Bank to the Schuchardts was limited to a hundred thousand dollars at any one time, the Cavarocs would, without question, have been entitled to the credit against that hundred thousand dollars of any dividends received from the Bank's trustee in bankruptcy. By permitting the amount to exceed the limit, the Schuchardts, if the decree of the Circuit Court be correct, have deprived the appellants of this right.

THIRD.

The Circuit Court erred in not applying the dividends paid by the Receiver of the New Orleans Bank upon the Schuchardt debt of $195,315.63, pro rata upon the $100,000 part thereof which the Court decreed to be secured.

In his original decision Judge WALLACE reached the conclusion (his Opinion, p. 69, fol. 123) that, to the extent of $100,000, Fry, as trustee for the Schuchardts, had a lien upon the bonds for the unpaid balance of their account against the bank.

Upon the settlement of the decree the appellants claimed upon this that credit should be given, *pro rata*, on the $100,000 for the dividends paid by the bank. Fry, as trustee for the Schuchardts, resisted this upon the ground that there were two demands, and that he had the right to apply the dividends on the unsecured demand.

Judge WALLACE held adversely to this (his Opinion, p. 71, fol. 127).

He, however, then decided that the bonds were to be treated as pledged to secure any unpaid balance upon the Schuchardts' account against the bank, and that this made it immaterial how the balance was reduced as long as $100,000 remained unpaid (fol. 131).

He settled the interlocutory decree, so far as concerns this provision, in these words (p. 74, fol. 134):

"It is further adjudged that the said Frederick Schuchardt & Sons at the time of their said bankruptcy also held the said bonds by virtue of a pledge or hypothecation by said Cavaroc & Son, which said last firm had power to create and which was binding on and enforceable against said bonds; that this pledge or hypothecation placed the said bonds as security to the said Frederick Schuchardt & Sons for any overdraft that had arisen in the course of the exchange transac-

tions between the said firm of Frederick Schuchard & Sons and the said New Orleans National Banking Association to the extent of $100,000, and that the said Frederick Schuchardt & Sons had a lien upon the said bonds for the unpaid balance of their account with the said New Orleans National Banking Association up to the amount of $100,000 and interest from the date of said balance of account, and which was binding on and enforceable against said bonds."

The decree further provided (p. 75, fol. 135): "That in applying upon the said balance of account of the said New Orleans National Banking Association due to the said firm of Schuchardt & Sons the amount received from said New Orleans National Banking Association, the same be applied in the first place as a credit on said balance of account and not *pro rata* on the part of said account secured by said bonds."

2. The pledge does not warrant this construction or admit of this effect. It made the bonds security for drafts not exceeding as maximum $100,000. If, when the account closed, the outstanding drafts amounted to $200,000, it would be $100,000 of that amount which would be secured. This is on the assumption that the bonds were liable at all.

But, even if the pledge admitted of the effect (in the respect in question) which the Circuit Court decreed for it, none the less should the dividends have been applied *pro rata*.

It must be remembered that on October 4, 1873, the Bank failed, and went into the hands of a Receiver (p. 24, fol. 45). Subsequent to that time there neither was nor could be an account current between the parties. The indebtedness neither could be nor was changed except by credits on the unpaid balance.

The balance of $195,315.63 is made up of $180,624.58 currency and $14,691.05 gold, in each case constituting indebtedness existing on October 4, 1873, at the time of the failure of the Bank.

Vide testimony of Casey, the Bank's Receiver, p. 113, fol. 191; and Fry's proof of debt in bankruptcy, p. 115, fol. 194.

The material fact is that the failure of the Bank closed the account. It liquidated the debt. The appellants upon paying $100,000 could have released the bonds. They then would have become creditors to that amount and would have received its dividend. They had the right to compel the Schuchardts to claim for this $100,000, receive the dividends and give credit for their account.

Upon this subject the law is clear. The appellants contend that no case can be found which supports the distinction upon which Judge WALLACE put his decision. He says that the distinction "seems subtle" (p. 73, fol. 130). It is a distinction which is not supported by the cases to which Judge WALLACE refers (his Opinion, p. 72). It is in conflict with the well-settled rules of law applicable to the case.

Story Equity Jurisprudence, § 499*d* :

"Yet there are many cases in which a surety paying a debt will be entitled to stand in the place of the creditor, or to obtain the full benefit of all the proceedings of the creditor against the principal.

"Thus, for example, if the creditor in case of the bankruptcy of the principal has proved his debt before the commissioners, and then the surety pays the debt, the latter will be entitled to the dividends declared on his estate and the creditor will be held to be his trustee for this purpose. (*Ex parte Rushforth*, 10 Ves., 409; *Wright vs. Moley*, 11 Ves., 12, 22, 23; *Watkins vs. Flanragan*, 3 Russ., R. 421).

"If the surety has paid only part of the debt proved, the dividends will be apportioned accordingly. (*Hobson vs. Bass*, L. R., 6 Ch., App., 792. *Gray vs. Seckham*, L. R., 7 Ch. App., 680).

"So the surety may compel the creditor to go in and prove his debt before the commissioner, and then, if he pays the whole debt, the creditor will in like manner become a trustee of the dividends for him."

Story on Contracts, § 883 :

"So also if the creditor, with the consent of the surety, accept from the debtor a percentage or reduc-

tion of the debt guaranteed, the surety is entitled to a proportional reduction of his own liability. (*Bardwell vs. Lydall, 7 Bing., 489*) Thus if the debt be $1,000, and the amount guaranteed be $500, and the proportion accepted be 50 per cent. of the original debt, the surety is only liable to pay 50 per cent. of the amount of his guaranty. If the composition be made without the consent of the guarantor, he is discharged thereby. If, however, the claim to the entire debt against the principal be extinguished by operation of law, as when he goes into bankruptcy, the consent of the surety to his accepting a dividend upon his claim is implied. Indeed it becomes the duty of the guarantee, in case of the bankruptcy of the principal, to prove his debt and take the dividend."

Bardwell vs. Lydall, 7 Bing., 489, 5 M. & P., 327, May 3, 1831:

Head Note. Defendant guaranteed plaintiffs against debts to be contracted by L. M. to the extent of £400. L. M. became indebted to plaintiffs to the amount of £625, upon which, by a composition with his creditors, he paid them 8*s.* 7*d.* in the pound, leaving due to the plaintiffs out of their whole claim £356.

The defendants being sued for that sum on their guaranty, *held*, that they were entitled to deduct from it £171 13*s.* 4*d.*, the amount of the dividend of 8*s.* 7*d.* in the pound upon £400.

BY THE COURT: If the whole amount of the debt from Mayhew had not exceded the £400, it is clear that the defendant would have received the full benefit of the dividend of 8*s.* 7*d.* in the pound, as he could not have been answerable under the guaranty for more than the remainder after the deduction of such dividend; and although the amount of the debt does in this case exceed the £400 and thereby the position of the creditors is so far altered that one part of his debt, viz., to the extent of £400, is guaranteed and the remainder is not, still there seems no reason why the application of a payment of so much in the pound upon the whole debt should in any way be affected by the collateral circumstance of the guaranty; or why such payment should not be applicable as well as to £400 guaranteed as to the part uncovered by the guaranty. For, suppose, the sum which

exceeds the £400 had been covered by the guaranty of another person, could it be contended that the plaintiffs might have applied the whole of the dividends to either part of the demand at their own election, and thus have varied at their own pleasure the extent of the responsibility of the two sureties? In the case supposed we think each of the sureties might have claimed a ratable deduction out of each pound of the amount of debt to which their respective guaranties extended. And if so, the same result appears to us to follow, whether the excess beyond the £400 is covered by the guaranty of a stranger, or the creditor is contented to become his own surety for the residue, etc., and to look for payment of it to the principal debtor alone."

Hobson vs. Bass, Law Rep., 6 Chan. Appeals, 792, July 19, 1871:

J. H. gave to B. a guarantee,—"I hereby guarantee to you the payment of all goods you may supply to E. H., but so as my liability to you under this or any other guaranty shall not exceed at any time the sum of £250." E. L. gave a similar guaranty. B. supplied goods to E. H. to the amount of £657. E. H. then became bankrupt. B. proved for the whole sum and then called on the guarantors who paid him £250 each. B. having afterwards received a dividend of 2s. 1d. in the pound on the £657,

Held, reversing the decision of Stuart, V. C., that each of the guarantors was entitled to a part of this dividend bearing to the whole the same proportion as £250 to £657.

Lord Hatherly, Lord Chancellor: "If a person guarantees a limited portion of a debt all the authorities show that if he pays that portion he has in respect of it all the rights of a creditor" (citing Paley vs. Field, 12 Ves., 435; Bardwell vs. Lydall, 7 Bing., 489; *Ex parte* Holmes, Mont. & Ch., 301; Raikes vs. Todd, 8 A. & E., 846; Thornton vs. McKewan, 1 H. & M., 525. "It is true that a surety may enter into an obligation to be liable to a limited amount for the ultimate balance remaining after all moneys obtainable from other sources have been applied in reduction of the debt, but a guaranty of that nature must be in a very different form from the present.

Raikes vs. Todd, 8 A. & E., 846. *Head note.*

If a creditor receive dividends upon a debt partly secured by guaranty of a third person, the dividends must not be appropriated to the excess of the debt above the sum guaranteed, but must be applied ratably to the whole debt, and the surety is relieved from liability by the amount of dividend on the part which is secured.

The guaranty read: "Oct. 19, 1832. Messrs. Raikes: "Gentlemen—I hereby undertake to secure to you the "payment of any sums of money you have advanced, "or may hereafter advance, to Messrs. Henry Davenport & Co. on their account with you, commencing "the 1st November, 1831, not exceeding £2,000. John "Todd."

ALEXANDER & TOMLINSON, *Arguendo.* By the Bankrupt Act, a surety who pays the debt may stand in the place of the creditor who has proved against the principal. * * * If the creditor has not proved, the surety may prove his payment as a debt, and receive the dividend on such debt. The principle of both these provisions is that the surety is to pay only the excess of the sum which he guarantees above the dividend paid his respect of such sum. Bardwell vs. Lydall candot be substantially distinguished.

LORD DENMAN, C. J.: We quite agree with you.

[*Note.* The provision of the Bankruptcy Law quoted here corresponds to our own given elsewhere.]

Ellis vs. Emanuel, L. R., 1 Ex. Div., 157 [1876].

When a surety gives a continuing guaranty limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor the guaranty is as between the surety and the creditors to be construed (*prima facie* at least) as applicable to a part only of the debt, co-extensive with the amount of the guaranty; but a guaranty limited in amount for a debt already ascertained which exceeds that limit, is not *prima facie* to be construed as a security for part of the debt only.

A debtor and his surety executed a joint and several bond for £14,000 conditional for avoidance if they, or either of them, should, in satisfaction of a debt of £7,000, then due from the debtor to the obligee, pay the £7,000; with a proviso that the surety should not

be liable under the bond for a sum or sums exceeding £1,300.

The debtor having paid £1,000, part of the debt, and then filed a petition for liquidation, the obligor proved and received a dividend for 9s. 2d. in the pound (about 45 per cent.) on £6,000 under the liquidation. After deducting from the £7,000 the £1,000 and the dividend, there remained more than £1,300 due. The obligee having brought an action on the bond against the surety to recover £1,300, the surety contended that he was entitled to deduct from the £1,300 a ratable proportion of the dividend, viz., 45 per cent. on £1,300, and was only liable for the balance.

Held, That the intention of the bond was that the surety should guarantee the whole £7,000, though his liability was limited to £1,300, that he was, therefore, not entitled to deduct a ratable proportion of the dividend, but was liable for the whole £1,300.

This case shows clearly the error of the Circuit Court. Judge WALLACE disposed of the case at bar as if *when the pledge was made* the debt of $195,315.63 was *ascertained;* as if the pledge was not *continuing;* and as if it secured the whole ascertained $195,315.63 up to $100,000.

His own decree is that the pledge was to secure any future balance of a continuing account; and that it extended only to $100,000 of the amount of that future balance.

Gee vs. Pack, 33 L. J., *Ib.*, 49; 9 L. T., N. S., 290:

A wishing to be allowed from time to time to overdraw his account with his bankers, the defendant gave them the following document: "On demand I promise "to pay to Messrs. G. & Co. £300 with interest on "same to secure an advance now or hereafter, on a "banking account with A."

A. became insolvent and paid by agreement with his creditors a composition of 16s. in the pound (80 per cent.). The bankers who had advanced much more than £300 received the dividend on their whole advance, leaving a balance on the whole of more than £300.

Held, That the promise by the defendant was to re-

pay an advance of £300, and that he was liable, therefore, only for the balance of £300 after deducting 16s. in the pound (80 per cent.) from that amount.

3. By the provisions of the National Banking Act the dividends paid by the Receiver were applicable ratably to the entire $195,315.63 owed by the New Orleans Bank at the time that it went into the hands of a Receiver.

To use the language of the Interlocutory Decree, that was the "unpaid balance of" the Schuchardts' account with the Bank. The pledge, if it existed at all, was for $100,000 of that amount. Any dividends paid by the Bank's Receiver necessarily belonged ratably to the secured and the unsecured part of the unpaid balance.

National Banking Laws, U. S. R. S., § 5234:

Appointment of Receivers: "On becoming satisfied, as specified in §§ 5226 and 5227, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the Comptroller of the currency may forthwith appoint a Receiver and require of him such bond and security as he deems proper. Such Receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell so compound all bad or doubtful debts; and on a like order may sell all the real and personal property of such as sociation on such terms as the Court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such Receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

Dividends, § 5236: "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him

by such Receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

4. The Circuit Court of itself held, in effect, that the $100,000 was entitled to its *pro rata* of dividends.

It held (*vide* next point) that interest was due upon the $100,000 from January 12, 1874. The effect of this was to make the bonds pay the $100,000 as of that date.

Judge WALLACE was of the opinion (p. 140, fol. 236) that the appellants ought to have paid the pledge and taken care of the bonds. His decree makes them in default for not doing so. It follows that, on January 12, 1874, the appellants not only had the right, but that it was their duty to pay the $100,000. They have been made to pay it, with interest, from that date.

To claim that, subsequent to that date, the appellants were not entitled to dividends upon the part of the debt which they owned, is wholly unsanctioned by principle or precedent.

FOURTH.

Assuming that there was a lien upon the bonds for the one hundred thousand dollars and that the appellants were not entitled to credit for the dividends received from the Receiver of the New Orleans Bank, it was error for the Circuit Court

to allow interest upon that $100,000 from January 12, 1874.

This was inconsistent with the theory upon which the Circuit Court deprived the $100,000 of its *pro rata* dividends.

The interest increased the $100,000 to $159,586.10 on December 19, 1882 (p. 147, fol. 256). That amount with interest from December 19, 1882, the Circuit Court decreed to be enforceable by Fry against the bonds. That amount has been realized to him.

1. The effect of allowing interest from January 12, 1874 is to make the $100,000 payable as of that date. That is the date down to which the Schuchardts made up their account against the Cavarocs and the Bank.

Vide Schuchardt's statements of claim, pp. 99 to 105.

Making the $100,000 due of that date recognizes that the appellants could on that day pay the $100,000. Their bonds have in effect paid the $100,000 as of that date. It cannot be the law that they can be deprived of the dividends which would have been applicable to the $100,000 if on January 12, 1874—they had paid the amount; and yet by being charged with interest, be made to pay the amount as of that date.

If they are not to be credited with the dividends, it necessarily follows that the $100,000 cannot run with interest from January 12, 1874.

The interlocutory decree and Judge WALLACE'S opinion recognize the inconsistency of both charging interest and depriving the $100,000 of dividends.

The opinion states (p. 73, fol. 130), that the $100,000 guarantee applies to the "ultimate balance that may arise upon the dealings between the debtor and creditor." "The conclusion is therefore reached that the bonds having been pledged to secure any unpaid bal

ance arising upon the account of the New Orleans Banking Association to Schuchardt & Sons, it is quite immaterial to the former how, when or by whom, part of that balance has been paid, as long as $100,000 remains unpaid" (p. 73, fol. 131).

2. If the failure of the Bank, the proof by Fry of the Schuchardt debt in bankruptcy, and the closing by the Schuchardts of their account on January 12, 1874, did did not create an ultimate balance so as to entitle the $100,000, to its *pro rata* of dividends, and something else was requisite for the purpose, something in the nature of the striking of an ultimate balance, nothing of that kind ever occurred. Down to November 21, 1880 (p. 104, fol. 177), Fry continued to receive dividends on the $195,315.63 from the bank. As long as he kept the account open for the purpose of enabling himself to collect dividends upon the entire $195,315.63, it cannot be said that there was an ultimate balance in the sense given to that expression by the Circuit Court in decreeing that the $100,000 was not entitled to its *pro rata* dividends.

The Master to whom the Circuit Court referred it to state the account, reported in accordance with this contention. The Circuit Court overruled this (p. 141, fol. 239). This was error.

3. There could be no default so as to start interest until the appellants were in a position to pay. This they could not do as long as Fry kept the debt unbalanced so as to be entitled to dividends on $195,315.63.

4. The fundamental error was in the decision that the appellants were not entitled to the dividends on the $100,000.

The effect of the decree is to make the $100,000 due, payable, and paid as of January 12, 1874. If the pledge was in force, this is correct. The appellants

having then paid the $100,000 owned that part of the debt.

FIFTH.

It was error for the Circuit Court to charge the bonds with interest upon the $100,000 at the rate of seven and six per cent. (on January 1, 1880, the legal rate in New York was reduced from seven to six per cent.), and to give credit for coupon moneys at the rate only of two and one-half per cent.

By the decree the Circuit Court decided that $67,566.91, which prior to December 19, 1882, had been received by Fry as trustee for the Schuchardts from coupons, should be applied in reduction of the Schuchardt claim (p. 148, fol. 257), as of that date, including interest only at two and a half per cent. (p. 79, fol. 140).

> *Vide* opinion of Judge WALLACE (p. 140, fol. 236) holding that Fry had no right to apply coupon moneys in extinguishment of the debt.

1. The two and a half per cent. interest was fixed arbitrarily by Fry. He was the president of the Bank of New York. The moneys were deposited by Fry in that bank, and two or three days prior to March 31, 1883, the date upon which he was examined as a witness he fixed two and a half per cent. as the rate of interest.

> *Vide* testimony of the Schuchardts' witness Leupp, p. 93, fol. 163.

2. The Circuit Court held that coupon money received by the Schuchardts was mingled with their

other funds, constituted credits upon their debt and was to be so applied at the time (p. 140, fol. 236). The same is true of moneys which came to the possession of Fry as trustee for the Schuchardts. There was no trust relation between him and the appellants or either of them. According to the decision of the Circuit Court his relation was that of a creditor holding the bonds and their coupons as security. Moneys realized from the securities necessarily went in extinguishment of the debt.

3. It does not alter the case nor is it any excuse for Fry to say that he did not know what the Court would adjudicate upon the subject of the conflicting interests in the bonds. It is not the Court which creates the rights and obligations of the parties. The Court merely determines what is the legal effect of the arrangement which the parties themselves made.

Fry could not hold on to coupon moneys or privately make a special deposit of them, the appellants being no parties to the proceeding, and thus deprive them of interest, upon the excuse that he did not know that the Court would approve the position which he maintained.

SIXTH.

It was error for the Circuit Court to decree full payment of the Schuchardt claim without any provision, in view of the fact found by the Master that, by the oversight inadvertence or omission of Fry, interest upon the bonds to the amount of $16,240 had become exposed to the defense of the Statute of Limitations.

1. The Master found (his report, p. 128, fol. 214) that

through the oversight, inadvertance or omission of the custodian of the bonds, a question was pending in the Courts of Louisiana as to whether $16,240 of coupon money was not barred by the Statute of Limitations.

Vide, Schedule D of Fry's Report, p. 78, fol. 139.

The Circuit Court ordered full payment to Fry without any deduction in respect to this question, holding (p. 140, fol. 236) that Fry was not liable for permitting coupons to become outlawed. If that had happened "he has not omitted to perform any act required of him by the parties who own the bonds. It was for them to pay the pledge, or take care of their own securities."

This is just the revers of what was decreed by the Circuit Court in refusing to allow to the appellants credit for the dividends received from the bank. The decision in that respect proceeded upon the idea that the appellants could not, at the time of the failure of the bank, pay the pledge and take up their securities. If they could, there surely can be no question that they would be entitled to the dividends.

2. Fry, as trustee, was either pledgee of the bonds and of their coupons, or he held them without right, the pledge having been discharged.

In the latter case, clearly he would be liable for the consequences of his wrongful act in withholding the bonds from the appellants and thus preventing their bringing suit for the coupons.

If he held the bonds as pledgee the coupons represented money applicable to the payment of his debt.

He gave no reason whatever for not collecting the coupon money. As the case stands, by his unexcused act the coupon money may have been lost to the appellants. As between them and Fry, trustee, the loss should fall upon the latter.

3. The decree should have charged Fry with the $16,240. If he collected the coupon money that would reimburse him. If not, the loss would fall where it belongs.

LAST.

The decrees of the Circuit Court should be reversed and the rights of the parties settled in accordance with the preceding positions.

JNO. E. PARSONS,
Of Counsel.

Office Supreme Court U. S.
FILED,
JAN 23 1889
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

EDWARD H. REYNES, sole surviving Assignee of Charles Cavaroc & Son, Bankrupts,
Appellants,

AGAINST

FREDERICK DUMONT, AUGUST HENRY REINE, JEAN DAVID MOCKEL and CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons.

No. 174.

Supplemental Mem. for Appellants.

FREDERICK DUMONT, AUGUST HENRY REINE and JEAN DAVID MOCKEL,
Appellants,

AGAINST

CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons, and EDWARD H. REYNES, sole surviving assignee of Charles Cavaroc & Son, Bankrupts.

No. 175.

First. The Court has jurisdiction to correct the errors of which the appellants complain.

They are not remediless, if there were a question of the jurisdiction of the Circuit Court to maintain the suit as a bill in equity. There is no such question.

1. Whatever may have been the case with the original bill, the amended bill made out a case for jurisdiction in equity.

(*a*) The claim of the complainants was for their equitable interest in the bonds and in moneys received by the Schuchardts and by Fry from coupons. The amount as between Fry and the appellants was only to be ascertained by an accounting.

And as between the complainants and the defendants assignees of the Cavarocs, their respective interests could only be ascertained by an accounting.

The necessity of an accounting of itself makes a case for equitable jurisdiction.

Story on Eq. Juris., § 456.

(*b*) Fry claimed to hold the bonds to secure a balance of account due to the Schuchardts from the Cavaroes.

The complainants were not parties to this account. They are not to be presumed to have known of its details. And yet, if their bonds were liable for it, they had the right to have the amount fixed. This could only be accomplished by an accounting.

The other claim of Fry was to hold the bonds as collateral to indebtedness of the New Orleans Banking Association to the Schuchardts.

To that neither the complainants nor the Cavarocs were parties. To ascertain the state of that account also required an accounting.

(*c*) Furthermore, to determine what amount was due against the bonds, if Fry could hold them as collateral, required an adjudication in respect of 7,088 pounds, 19

shillings and 10 pence sterling on deposit with the Union Bank of London.

Neither the complainant nor the Caverocs were parties to that transaction. It involved the necessity of an accounting and also of a discovery of books and papers.

2. A complete determination of the rights of all parties required a settlement of all the above questions. This could only be accomplished by suits. Unless all the questions involved could be determined in one suit, a multiplicity of suits would be necessary. To prevent that equity entertains jurisdiction.

3. That some of the questions above stated were disposed of by agreement or otherwise, pending the suit, did not undo the jurisdiction.

Ward vs. Todd, 103 U. S., 327.

Second. The Circuit Court had jurisdiction of the parties. The subject matter of the suit was within its jurisdiction.

If Fry claimed that the suit should be on the common law instead of the equity side of the Court, he should have taken that objection.

Town of Metnz vs. Cook, 108 N. Y. 504,

laying down the familiar rule of equity; of which R. S. § 723 is only declaratory.

Bryce vs. Grundy, 3 Pet., 210.

Instead of doing so he did not deny the allegation of the amended bill (fol. 9) that no adequate relief could be obtained in equity. He asked affirmative relief himself (his answer, fol. 20) in respect of the deposit with the Union Bank of London. The final

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decree (fol. 292) was entered on his application ; and by and under the decree Fry received $91,366.85.

His Receipt, fol. 274.

This was in addition to an equally large amount which had been received by him and by the Schuchardts, his right to retain which, the decree of March 5, 1884, adjudicated in his favor on his application (fols. 255 to 258).

Having obtained by the decree from which the appeals are taken these benefits, erroneously as the appellants claim, he cannot dispute the jurisdiction of this Court to correct the errors.

Third. The fact that the bills of exchange which the decision of the Circuit Court makes the bonds pay were drawn *by the New Orleans Banking Association* upon Dutfoy, Seignouret, and Honorat, instead of being purchased bills, if it is material at all, has the effect to take those bills out of the pledge.

The contention of the appellees is that, as those bills did not represent purchases of exchange, they cannot be treated as covering advances made for such purchases, and that in consequence, accepting the appellant's construction of the pledgee, *i. e.*, that it only protected advances until they were covered, there was no "covering" of these bills.

The answer to this is two-fold :

1. The Schuchardts having accepted these bills as coming within the pledge, that is to say, as covering advances previously made by the bank, the pledge spent itself.

2. If the position of the appellees were correct, the transaction never was brought within the terms of the

pledge. It applied to advances to be made upon purchases of exchange by the bank.

Vide the Cavarocs' letter, fol. 54; the Schuchardts' answer, fol. 54.

Vide also the Schuchardts' previous letter of December 4, 1871—"We hereby authorize you to draw upon us in advance of remittances to the extent of $100,000 (one hundred thousand dollars), with the understanding that such drafts are to represent exchange actually bought and paid for" (fol. 51).

Vide also the Bank's letter of February 6, 1873, to the Schuchardts (fol. 52): "Are we still authorized to draw *à découvert* $100,000 (one hundred thousand dollars), against purchases of exchange."

Vide also the Bank's letter of February 15, 1873 (fol. 52).

The complainants and the Cavarocs were largely interested that the terms of the pledge should be followed. In that case the advances would be represented by actual exchange, presumably and probably good.

To give the Schuchardts a claim against the bonds required that the transaction should come within the terms of the pledge.

When the bills were received by them, it was for them to determine whether they would accept or reject them. They did accept them; and forwarded them to France for acceptance by the drawees. This was before October 1, 1873 (fol. 100); before the failure of the bank. For the Schuchardts to accept the bills; and one, two and three months afterwards.

Vide dates, p. 57.

to charge them back in the account, and thus seek to make the bonds liable for them, was to endeavor to hold the bonds for a transaction which they now claim was outside of the pledge; and, furthermore, to post-

pone or extend until after the failure of the bank the time of payment, to the consequent disadvantage of the appellants. This the law does not permit.

Story on Contracts, § 874.
Miller vs. Stewart, 9 Wheat., 680.

JNO. E. PARSONS,
For Cavarocs' Assignee.

Office Supreme Court U. S.
FILED,
JAN 22 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

FREDERIC DUMONT, *et al.*,

vs.

CHARLES M. FRY, Trustee in Bankruptcy of SCHUCHARDT & SONS, *et al.*

This case comes before the court on appeal from two decrees of the Circuit Court of the United States for the Southern District of New York, made respectively on the 10th day of March, 1884, and on the 10th day of February, 1885.

The appellant is the complainant in a suit in equity brought by him and others as partners in business, to compel the defendant Fry, trustee, etc., to deliver over to him certain bonds and moneys in his hands as proceeds from the sales of the coupons of the said bonds. The facts are substantially undisputed, and are as follows:

Facts.

The firm of Cavaroc & Son, prior to the month of October, 1873, was doing business in the city of New Orleans. The business of the firm was a mer-

cantile business, but Charles Cavaroc, the senior member, was at the same time the President of the New Orleans National Banking Association.

During the period covered by the transactions in controversy Schuchardt & Sons were doing business in the city of New York and were correspondents and financial agents there of Cavaroc & Son, and also of the New Orleans National Banking Association of that city.

Two hundred and thirty-two bonds of the city of New Orleans, being the bonds in suit, were entrusted by Cavaroc & Son to Schuchardt & Sons in September, 1870. (Opinion of Wallace, J., fol. 116). There is some conflict between the parties as to the terms and conditions under which the bonds were delivered by the former to Schuchardt. As matter of fact, however, it is not disputed that it was done in 1870, and for the convenience of Cavaroc. (Opinion of Wallace, J., fol. 116). Nor is there any doubt that they were used pursuant to directions of Cavaroc & Son, ostensible owners, for the purpose of facilitating their financial operations. It is not denied upon the proofs that the complainants, Dumont and others, are the equitable owners of 74 per cent. of the bonds which form the subject of the controversy.

The legal title being in Cavaroc & Son, with nothing to indicate the equitable rights of the complainants, it was held by the court below that the bonds were subject to the lien acquired by Schuchardt & Sons through their dealings with Cavaroc & Son, and the present controversy principally involves the question as to the character and extent of these liens. (Opinion of Wallace, J., fol. 115).

It was insisted by Cavaroc on the trial that the securities were not deposited with Schuchardt in the

ordinary course of business, but were originally sent from New Orleans to New York for the purpose of having a loan negotiated on behalf of Cavaroc & Son through Schuchardt. The testimony on pages 52 and 53 shows a series of transactions by which the bonds were used as security in procuring loans for Cavaroc & Son *from other parties*; it further shows that they were under the control of Cavaroc, who gave directions as to what should be done with them.

The learned judge below held that the bonds having been entrusted to Schuchardt & Son *in the absence of any special understanding to the contrary*, they acquired a banker's lien upon them, except as to those expressly hypothecated for the benefit of the Banking Association. The principal question in this case arises as to the lien, if any, which this latter corporation may have upon the bonds. The facts upon which the judgment of the court turned are these:

The New Orleans Banking Association dealt largely in foreign bills of exchange, which it negotiated through Schuchardt. By the course of business, the amount of the foreign bills remitted from time to time by the Banking Association to Schuchardt & Sons was credited by the latter to the former, and the latter drew upon the former from time to time as funds were required by it. (Opinion of Wallace, J., folio 117.) By the custom of business at New Orleans, advances are made by bankers to shippers in anticipation of the actual delivery of the bills and accompanying documents, and the Banking Association was consequently necessitated to advance funds for that purpose before it could remit the bills, and be credited by Schuchart & Sons with their amount.

In order to assist the Banking Association in this behalf, and undoubtedly for the mutual profit of both concerns, the Banking Association had at times been permitted by Schuchardt & Sons *to draw in advance of remittances*. (Opinion of Wallace, J., p. 67.)

December 4th, 1871, such an overdraft was authorized to the extent of $100,000. upon the condition that the drafts should represent exchange *actually bought and paid for*. The transactions between the two banking concerns were large, being sometimes over a million of dollars daily. (Opinion of Wallace, J., folio 118.)

The hypothecation made by Cavaroc for the benefit of the Banking Association was made in 1873, and the important question in the controversy is concerning the construction and meaning of that hypothecation. It arises from the correspondence of the parties, which was conducted in the French language. (Opinion of Wallace, J., folio 118.)

February 6th, 1873, the cashier of the Banking Association wrote to Schuchart & Sons: "Are we still authorized to draw *à découvert* $100,000 against purchases of exchange? Advise by wire."

February 11th, 1873, Schuchardt & Sons replied: "The credit of $100,000. *à découvert* was predicated upon the deposit of New Orleans city bonds, and on their withdrawal we supposed the agreement cancelled."

February 15th, 1873, the cashier of the Banking Association answered: "Your letter of December 4th, 1871, authorized us to draw in advance of remittance to the extent of $100,000. represented by purchases of exchange advised by telegraph. There was no mention of a deposit of city bonds to guarantee such overdraft, and we have been acting ever since under the impression that the credit was still

in force. We now note that it is cancelled, and beg leave to refer you to the private letter of our president upon the subject." On the same day C. Cavaroc, the president of the Banking Association, wrote Schuchart & Sons, referring to their letter of the 11th inst.: "I authorize you to consider a portion of the bonds belonging to my firm which you have in your possession as collateral security *en cas de découvert*."

February 27th, 1873, Schuchart & Sons wrote to the cashier of the Banking Association: "In reply to your president's letter of the 15th inst., we take pleasure in authorizing you in accordance with the terms therein stated, to draw on us *à découvert* for a sum not exceeding as maximum $100,000. *against exchange purchases*."

All paper alleged to be bought and sent to Schuchardt & Sons, was so bought and sent. No claim is made by Schuchardt & Sons, that any drafts reported to be sent were not received.

The New Orleans Banking Association failed on the 4th day of October, 1873, as did also Cavaroc & Son. At the time of the failure Shuchardt & Sons had $232,000. of the bonds in controversy in their possession, and there was due from the Banking Association to them $4,121.92, and there subsequently resulted by reason of the non-payment of drafts and bills which had been remitted by the Banking Association and credited by it, but charged back to its account because uncollectible, the sum of $195,315.63. Upon the account between Schuchardt & Sons and Cavaroc & Son a debt arose against Cavaroc & Son of $7,454.22. Subsequently Schuchardt & Sons failed. (Opinion of Wallace, J., page 68.)

The defendant Fry insisted in the court below, and succeeded in maintaining his position, that the

bonds thus held were subject, not only to a banker's lien for their benefit to the extent of the indebtedness of Cavaroc & Son, but *also to the extent of $100,000. for all claims of Schuchardt & Sons for the payment of all advances made by them to the bank upon a final statement of their respective accounts.*

On the other hand, it was insisted and is now respectfully submitted to the court on behalf of the complainants, Dumont and others, that the hypothecation simply contemplated securing Schuchardt & Sons to the extent of $100,000. *in advance of transmission to them of exchange*, and to the extent that bills of exchange were transmitted the terms of the hypothecation were satisfied, although the exchange proved uncollectible.

In compliance with the directions of the court, the master ascertained the unpaid balance of the account due from the Banking Association to Schuchardt & Sons to be, with interest, $195,315.63, and to the extent of $100,000. and interest, the bonds were held liable for the claim. It was also held that the bonds having been left by Cavaroc & Son with Schuchardt & Sons *without any special agreement*, except the pledge of a portion of them for the New Orleans Banking Association, those not thus pledged were subject to the banker's lien of Schuchardt & Sons. (Opinion of Wallace, J., folio 123.)

It is respectfully submitted that the decision below is wrong and should be reversed, because,

1st. The complainant Dumont, the equitable owner of 74 per cent of the bonds, was entitled to recover them from Fry free from any lien, except for such claim as might exist in favor of Schuchardt

under the agreement between Cavaroc and that firm.

2d. By the terms of the agreement, as plainly expressed in writing, Schuchardt was entitled to look to the bonds only to the extent of any deficiency in the remittance of drafts ; as soon as the drafts were remitted, that lien was discharged.

3d. There is nothing in the agreement between the parties, either in express terms, or necessary implication, which would hold the bonds in suit for a balance arising out of all the transactions between the bank and Schuchardt.

4th. Upon this theory there being no claim that any draft ever alleged to have been purchased by the Banking Association and forwarded to Schuchardt & Sons was not so purchased and forwarded, and was not received by Schuchardt & Sons, no claim exists upon the bonds.

Were it otherwise, and were the bonds subject to a lien for non-payment of any drafts contemplated in the written agreement between the parties, then the recovery should be limited to the amount of actual losses against *exchange purchases;* (pp. 28–29–30).

The loss, with a trifling exception, arose not out of paper actually *bought and paid for* (Schuchardt & Sons letter of December 4th, 1871, fol. 51), but *out of drafts of the bank itself.*

5th. But even upon the theory that the $100,000. for the *à découvert* credit applied to the general indebtedness of the Banking Association, that security was to be fixed as of the date when the balance was struck, which was first done before the master in 1882, or it was to be struck as of the 4th of October,

1873, the date of the failure. If the latter, as held by the court below, be correct, the dividends paid by the bank should be credited to the owners of the bonds; (see pp. 76 and 77).

POINTS.

I.

The principal question in the case arises as to the meaning of the contract between the parties. That their respective rights must be tested and governed by the written communications between them is evident, and is admitted by the learned judge below. He cites the letters and telegrams exchanged between Cavaroc and Schuchardt and between the bank and Schuchardt, and undertakes to ascertain how far the bonds were hypothecated *under the terms of the correspondence referred to.* (Opinion of Wallace, J., folio 118).

Although the question is apparently complicated by the use of a commercial expression in a foreign language, and much facility is thereby given to the exercise of ingenious refinements and plausible paradoxes, there seems to be no real difficulty in ascertaining what the parties meant, and whether it is held that *à découvert* should be translated "uncovered" or "unsecured," is a matter of very little consequence. It may be translated by either expression without thereby impairing the force of the complainant's contention that all that was ever contemplated between the respective parties was to secure Schuchardt against the *bank's failure to re-*

mit the paper which it had undertaken to forward.

Indeed, it would seem difficult, if they had this intention in their minds, to make it plainer than they have done by the language that they used. We leave out the testimony of the respective parties, Cavaroc, and Wells (who was one of the partners in Schuchard & Sons' firm) and confine ourselves to the written evidence of their intention.

It will be observed, in the first place, that Schuchardt & Sons were the correspondents and financial agents in New York of Cavaroc & Son, bankers, of New Orleans, and also of the New Orleans Banking Association of the same city. (Opinion of Wallace, J., folio 115).

It was not, therefore, the ordinary relation between a banker and a chance customer, but one regularly and for years established between the parties upon a basis, we may presume, of mutual confidence in the integrity and business ability of each other.

Bearing this in mind, we find that on the 4th of December, 1871, Schuchardt & Sons established a certain basis of business which they committed to writing, and in the expression of which they used the English language.

II.

This paper, to be found on page 28, is as follows: "In order to evince our desire of doing all in our power to contribute to the development of our correspondence, we hereby authorize you to draw

upon us, *in advance of remittances*, to the extent of $100,000. with the understanding that *such drafts* are to represent exchange *actually bought and paid for*."

It is clear from this that Schuchardt & Sons were willing to assume two risks: First, that they were willing to take, accept and deal with the drafts, provided they represented exchange actually bought and paid for; second, to imperil $100,000. on the chance of their receiving remittances of such drafts. In this connection it may be important to state that the parties were both aware that exchange of New Orleans was purchased by making advances until such time as the drafts are delivered. (Opinion of Wallace, J., fol. 54).

The interest of Schuchardt to increase the business is not only avowed by himself, but it is very clear. He charged a banker's commission of ¼ to ½% on the large amounts in which he dealt, but besides this credited himself as against Cavaroc with 7%, while he allowed him but 4%. (P. 90; bottom of page).

In February, 1873, the bank for some reason hesitated to draw upon Schuchardt & Sons for the $100,000. and asked with telegraphic brevity and clearness, "Are we still authorized to draw *à découvert* $100,000. *against purchases of exchange, advise by wire?* What *à découvert* means here, is not shrouded in mystery, even though in the guise of a foreign word, and may be translated "without security," or "without remittance," or by any other expression to show that it was an advance of money to be made by the bank against purchases of exchange.

Thus far there could be no difficulty between the parties. They must have understood that the *à découvert* was simply a temporary one, to last until

the remittances of exchange had been effected. Schuchardt & Sons answered this by stating that the credit of $100,000. *à découvert* was predicated upon the deposit of New Orleans city bonds, and that on the withdrawal they of course supposed the agreement to be cancelled. (Page 29).

This theory of theirs was probably based upon the idea that they had some claim upon the securities, whether they were pledged or not.

Such an idea is vaguely indicated in their letter of December 4th, 1871, (folio 51). The cashier of the bank thereupon answered, and, wisely confining himself to the use of a single language, expressed himself with great precision and clearness. His letter is worth reproducing as throwing light upon the whole controversy:

NEW ORLEANS, February 15th, 1873.

Messrs. SCHUCHARDT & SONS,
New York.

Your letter of December 4th, 1871, authorized us to draw, *in advance of remittance, to the extent of $100,000. represented by purchases of exchange advised by telegraph.* There was no mention of a deposit of city bonds to guarantee such overdraft, and we have been acting ever since under the impression that the credit was still in force. We now note that it is cancelled, and beg leave to refer you to the private letter of the president on the subject.

(Signed) H. T. BLANCHE,
Cashier.

Thereupon Cavaroc, the ostensible owner of the bonds, wrote the letter of February 15th, 1873 (fols. 53–54), authorizing Schuchardt to consider a por-

tion of the bonds belonging to his firm which they had in their possession as collateral security *en cas de découvert*, which is there translated "in case you should not be covered."

He does not, it is true, expressly state that the advance of funds *à découvert* is *against exchange purchases*, evidently understanding this to be implied from what had previously passed between the parties. If any doubt existed after this, it seems to be removed by the letter of Schuchardt & Sons themselves, to be found at folio 54:

"In reply to your worthy president's letter of the 15th inst. we take pleasure in authorizing you, in accordance with the terms therein stated, to value on us *à découvert* for a sum not exceeding as maximum $100,000, *against exchange purchases*."

III.

If all the evidence ended here, it is hardly possible that the learned judge below would have extended the lien based upon such clear and unmistakable terms beyond the manifest intention of the parties, and held the bonds for any balance which might thereafter be created, *in any way*, between them. But he lays "great stress" upon the supposed understanding of the Banking Association, and of Cavaroc & Son, themselves, that the bonds were pledged as security for an overdraft, arising in part from uncollected remittances, and he calls attention to a resolution of the bank passed in *September, 1873*, stating that with a view of securing the president against eventual loss of the 7% city of New Orleans

bonds belonging to the firm of C. Cavaroc & Son, and actually pledged to Messrs. F. Schuchardt & Sons as collateral security for the payment of all foreign exchange bills sent them for negotiation, and by them endorsed, he (Cavaroc) might select such securities as he thought proper to the extent of $100,000. from the treasury of the bank.

IV.

It is difficult to see how the acts, or statements, or dealings of Cavaroc and the bank, both of them upon the brink of bankruptcy, can affect either Schuchardt or the equitable owner of the bonds, Dumont.

That Cavaroc needed one hundred thousand dollars of securities, and was anxious to get them, is very plain, and it is possible that, under the circumstances, he did not draw the resolution permitting him to appropriate this large sum with any special view to limit his liability to Schuchardt, and, therefore, his claim to the bank's favor.

Granting that the statement is inconsistent with the theory that the uncovered balance to be secured was merely for a failure to remit, Cavaroc's statement a year after the contract had been made is not of any value whatever, except, perhaps, as against himself, and we respectfully submit that an operation in which he was interested to misrepresent the real contract to the extent of one hundred thousand dollars, to be paid to himself, does not afford a fair criterion of the nature of an agreement entered into long before. His declarations thus made can no

more avail the defendant Fry to establish his position than the almost contemporaneous attempts by Cavaroc upon Schuchardt & Sons to obtain the 2½2 bonds which he then alleged to be held *in trust for his firm*. The most that can be said is that his view of the case varied : it was favorable to Fry when he dealt with the bank, and was favorable to Dumont when he dealt with Schuchardt.

V.

The plausibility of the complainant's view is supported by all the circumstances in the case. The dealings between the parties were very large, so large that a mere pittance of one hundred thousand dollars would be of very little value, if it were based upon fear that any considerable part of the drafts would not be paid. Their business covered millions of dollars—sometimes a million of dollars in one day. Schuchardt was as familiar, presumably, with the value of drafts as was Cavaroc, and he reserved to himself the right of dictating to what extent the purchase of drafts should go.

Thus, we find a memorandum made by Schuchardt (see page 42), providing that not more than £10,000 per week shall be purchased on Hambro, nor more than 200,000 fr. on first bankers of Paris, and as much business paper as shall be desired, they (Schuchardt) *reserving the right to limit the amount on any one house*. (page 42).

This is extremely important, as showing that Schuchardt limited his risks, and was willing to accept them, provided he had some control in the

designation or limitation of the paper that was to be purchased; the only reason that he did not wish to remain *à découvert* being the danger of the bank's not sending the paper actually purchased. So manifest is this, and so clear the distinction between "business paper" (the purchase and remittance of which was guaranteed by the bonds) on the one hand and the drafts of the bank on the other, that the latter is specially provided for as follows: "*When the bank sends the drafts of the bank on third parties (Havre, Bordeaux, Marseilles, etc.), it must put in the hands of Messrs. C. C. & Sons, in trust, a deposit of securities, there to remain until the acceptance of the payment, if we deem proper to await the payment*" (Page 42, folio 75).

This shows, and the result exhibits the wisdom of the distinction, that a broad line of difference was established between business paper *purchased* by the bank and drafts from the bank itself on third parties. It is submitted with great confidence that the bonds in question having been deposited to answer for such failure as might arise in the case of *business paper* only, the same bonds are not liable, in default of any other agreement for loss upon the drafts of the bank, which constitute the other class of business.

VI.

In support of this, attention might be called to the last line in this same memorandum, limiting the drafts of the bank on Seignouret (evidently misprint-

ed "Lignouret,") to 500,000 fr.; if we turn to page 116 we find that drafts on Seignouret Freres & Co. to the extent of 250,000 fr. were protested, and to that extent, under the provisions of the decree below, the bonds are held, although a plain distinction is made by the parties themselves by which such drafts as those of the bank on Seignouret were excluded from the operation of the agreement *à découvert*.

VII.

If it should be said that the natural inference would be that the bonds should be kept as security for worthless drafts, we would repeat what we have attempted to make clear above and add the following: Schuchardt & Sons, by their calling, were presumably judges of the paper in which they were dealing, and considered themselves, as their intention and state of mind is shown by the papers, covered when they received the remittances of drafts. Until drafts were remitted they were *à découvert;* that is, uncovered; the moment the drafts were received they ceased to be *à découvert*, and were covered.

VIII.

Even if solvent firms afterward became insolvent, this could not change the character of the paper at the time, so far as the judgment of the parties was concerned. Schuchardt was as fully covered when he

received the business paper which he had agreed to receive as though he had received any other form of merchandise or security. If he had agreed to advance one hundred thousand dollars to enable Cavaroc to purchase Texan cattle of a certain type, and in order to insure the application of his money to such purchase he had exacted a security to continue in force so long as he remained *à découvert*, would he not become free as soon as he received the cattle, or the bills of lading, showing their shipment in good and proper condition?

The cattle would then constitute his security for his advances; in other words, he would no longer be *à découvert* or uncovered; and if a third party had consented to the use of his bonds to guarantee the good faith of Cavaroc in the application of funds to such purchase, would the holder of the security be bound to wait an indefinite period to ascertain whether the cattle died from pleuro-pneumonia or were shipwrecked on the voyage to Europe? We confidently submit that, unless the parties choose to make such an agreement, which, of course, they might make if so inclined, there is no implication beyond the letter and spirit of their agreement, and the contention of the complainant and appellant should be sustained.

IX.

The following citations from the most approved lexicographers of France will support this claim. Thus:

Crédit à découvert. Avances faites par accepta-

tions ou par débours de caisse, sans être garanties par connaissements des marchandises consignées ou des contre-valeurs.

Larousse, Grand dictionaire universel.

Translation: Advances made by acceptances or cash disbursements, which (advances) are not covered by bills of lading, consigned goods or other securities.

So Littré, Dictionnaire de la langue française:

A découvert. Terme de commerce: *Etre à découvert, être en avance, n'avoir aucune garantie des avances faites* (A découvert, commercial expression. To be "à découvert," is to be in advance, to have no guaranty of the advances made).

So in the Dictionaire de l'académie:

A découvert. Etre à découvert, signifie en terme de commerce, n'avoir aucun gage, "aucune garantie pour sa créance" (to be *à découvert* signifies to have no pledge, no security for one's claim).

So too, Bescherelle, Dictionaire national.

Commerce. *Etre à découvert: N'avoir aucun gage de sa créance* (Commerce; to be "a découvert: to have no security or pledge for one's claim).

In the light of these concurring definitions, especially of the first cited (Larousse, Grand dictionaire universel), is it not plain that Schuchardt & Sons were *à découvert* only so long as they failed to receive the drafts upon the faith or the promise of which they made the advances? Surely they were secured for these advances, which were in fact not cash but simply acceptances, the moment the bills were sent them, which they had agreed to receive, to discount and to collect.

X.

The learned court below erred in holding that Schuchardt & Sons, or their assignee in bankruptcy were entitled to a banker's lien against Charles Cavaroc & Son upon the bonds issued for the balance due from Cavaroc to Schuchardt, which is proved in the case to have amounted to $25,715.22, and to this extent we understand the court below sustained the claim of the defendant Fry to a lien.

It will be observed that there is no pretence that the bonds in suit were pledged under any special agreement to respond to the claims against Cavaroc; on the trial the learned judge expressly holds that the bonds having been left by Cavaroc & Son to Schuchart & Sons without any special agreement except the pledge of a portion of them for the New Orleans Banking Association, those not pledged are subject to the banker's lien of Schuchardt & Sons.

We submit that upon the evidence it is plain that they were not deposited in the ordinary course of business. Schuchardt & Sons never claimed that they were entitled to withhold them, until after the bankruptcy of all parties in interest. The securities were originally sent from New Orleans to New York for the purpose of having a loan negotiated on behalf of Cavaroc & Sons, through Schuchardt & Sons. (See testimony of Lawrence Wells, of the firm of Schuchardt & Sons, pages 52 and 53.)

A series of transactions is shown by which the bonds were used as security in procuring loans from Cavaroc & Son to other parties, on the payment of which they were returned to Schuchardt & Sons where, according to the testimony of Cavaroc, Junior, (page 41), they remained for safe keeping;

not having been deposited in the ordinary way of deposits of bankers, there is no implied agreement upon which a lien can be predicated, and it is respectfully submitted that they are free from the banker's liens, so far as the debts of Cavaroc are concerned.

Where a customer has deposited securities with a banker as collateral to a particular debt, the latter has not, under the circumstances, a general lien thereon, as the right of the debtor to take up the collateral before maturity is not reconcilable with a right in the creditor to hold on after payment for any general balance.

Grant *vs.* Taylor, 35 Sup'r Ct. (J.& S.), 338; affm'd 52 N. Y., 627.

The banker's lien does not extend to all securities happening to be in the banker's hands for any purpose.

Petrie *vs.* Meyers, 54 How. Pr., 513.

A banker holding a pledge for a specific sum has a lien only for that amount (Hill & D., Supp. 304; 14 Barb., 536), and cannot, by reason of a banker's general lien on securities in his hands, extend it to cover other advances, unless by special agreement.

(Story on Agency, §§ 380-81, 5 Metc., 259; Grant on Banking, 168; 3 Parsons on Contracts, 262; Duncan *vs.* Brennan, 83 N. Y., 487).

Where certain bonds are pledged to a broker or banker, to secure the payment of a particular note, he has no lien upon such securities for the payment

of any other claim. So held in an action for conversion of the bonds.

Wyckoff *vs.* Anthony, 9 Daly, 417; affirmed, 90 N. Y., 442

See also note, collection of cases on Banker's Lien, 33 Moak's Eng. Reports, p. 324.

A general lien for a balance of accounts is founded on custom, and is not favored; and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties to establish it. General liens are looked at with jealousy, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors.

Kent's Commentaries, 12th ed., Vol. 2, p. 636.

XI.

The ground upon which the learned judge below held that the defendant Fry had also a lien upon the bonds to the amount of the balance of account due from Cavaroc & Son to Schuchardt & Sons, (page 70, folio 123), is stated by himself as follows: "The bonds having been left by Cavaroc & Son to Schuchardt & Sons without any special agreement except the pledge of a portion of them for the New Orleans Banking Association, those not thus pledged are subject to the banker's lien of Schuchardt & Sons."

This is an error of fact, if the learned judge in-

tended to convey the idea that the bonds were at all separated, so that part of them applied to any claim against the bank, and part of them were omitted and thereby became subject to a banker's lien.

Although it is true that Cavaroc in his letter does use the expression. "I authorize you to consider a portion of the bonds belonging to my firm which you have in your possession as collateral security in case you should not be covered," yet in fact no portion was specifically assigned, and the claim throughout has been that all the bonds were pledged to the extent of one hundred thousand dollars to the payment of Schuchardt's claim against the bank, if any.

About this there can be no real dispute. The answer of the defendant Fry is plain to this effect. He says that *the bonds* were deposited with the said Frederick Schuchardt & Sons as security for any indebtedness or balance of account which at any time might or could arise in the course of their aforesaid dealings, etc., and the learned judge below holds that a hypothecation of *the bonds* to Schuchardt & Sons was made by one of the Cavarocs for the benefit of the New Orleans Banking Association in February, 1873 (fol. 118), and that, to the extent of $100,000, defendant Fry, as trustee for Schuchardt & Sons, has a lien upon *the bonds* for the unpaid balance of the account of the New Orleans National Banking Association. In other words, all the bonds were pledged to the extent of $100,000 for some possible claim, as to the real nature of which the parties do not agree, on the part of Schuchardt & Sons against the bank.

(See order and decree; fol. 174, also the decree at fols. 133, 134. Also opinion of Wallace, J.,

fol 235: "The terms of the pledge were that the bonds then in possession of Mr. Schuchardt should be held by them as security for any advance or overdraft which might ultimately exist in the dealings of the parties to the extent of $100,000.")

No better test can be offered to prove the correctness of this view than this: Suppose the bonds had been worth forty cents on the dollar. Would not all of them have been liable to the claim of the bank? If not, what portion could have been separated to answer this claim, and what omitted as being the property of Cavaroc, subject to the banker's lien?

Upon this assumption, the rule of law established in the courts of this country, including the Supreme Court of the United States, is clear. The rule is thus laid down in Mr. Jones' work on Liens:

"A banker or broker holding securities pledged for the payment of a particular debt has no lien upon them for a general balance of account or for the payment of other claims. The general lien is limited and defined by the express contract. Thus, if a partnership and an individual member of the firm have accounts with the same bank, and the partner deposits certain railway shares as collateral security for a certain promissory note of his own discounted by the bank, or for any sums he may thereafter owe to the bank, the fact that the shares were the property of the firm, and that the discounts obtained by the use of them were employed for the purposes of the firm, does not entitle the bank to hold the shares as a security for a balance due him from the firm.

"A customer of a bank deposited with it as security for his current indebtedness on discounts on the note of a third person secured by mortgage, and

afterwards withdrew the same for the purpose of foreclosure and collection under an agreement to return the proceeds or to furnish other securities. He purchased the mortgaged property at the foreclosure sale, and at the request of the bank deposited with it the deed of the property. His indebtedness to the bank was afterwards fully paid, and for a time he had no dealings with it. Afterwards, he incurred other debts to it, and was largely indebted to it when he became a bankrupt. It was held that the bank had no equitable lien on the property mentioned in the deed." (§ 251, vol. 1, p. 165).

In support of this last proposition the author cites the Railroad Co. *vs.* McKinley, 99 U. S., 147. This, however, is a clerical error, the true reference being to Biebinger *vs.* Continental Bank, p. 143 of the same volume.

There is, therefore, an obvious fallacy in the learned judge's decision, and he should have found that there being an agreement between Cavaroc, the ostensible owner of the bonds, and Schuchardt, by which they were pledged to the extent of $100,000. to the bank they were not liable to a general lien as against Cavaroc. The general lien, even if it would have otherwise existed, was displaced by the specific lien given to Schuchart to the extent of $100,000. in his favor to protect him in case of disability on the part of the bank.

XII.

Our position seems to be particularly strong when

it is considered that 74 per cent. of the bonds belonged equitably to the complainant Dumont, and that every reasonable intendment is in his favor. As we have endeavored to make clear above, whatever may be the fact as to Cavaroc, Dumont is not concluded by the recitals in the resolution of the Banking Association, and is entitled to insist upon a strict performance of the contract between the parties. No intendment can exist as against him to deprive him of his property. It is sufficient that, according to the rules that affect negotiable instruments, he should be bound without assent on his part expressed or implied, and without knowledge, to sustain any loss as a result of his correspondent's operations.

XIII.

A serious question arises as to the application of the dividends realized from the assets of the New Orleans Banking Association. The appellant claims that the rule applied by the learned judge below cannot here be sustained; that it is extremely harsh and unjust in its application to him, and actually works inconsistent results. The comptroller of the currency declared dividends amounting to 60 % to the creditors of the Banking Association, and the defendant Fry received that percentage of his debt, which had been proved as a debt without security to the amount of $195,315.63. He claimed to apply the whole payment thus received, first, to discharge the unsecured portion of the claim of Schuchardt & Sons against the Banking Association, whereas

the other parties to the controversy insisted that it should be applied ratably upon that part secured by the collaterals, as well as upon the part unsecured. (Opinion of Wallace, J., page 71).

It will appear from that opinion that the entire amount of the dividends was credited to the $195,000, and there being still $100,000, he decided that *that* $100,000, was the hundred thousand for which security was held, and that therefore *no credit should be given for the payment of these sums to the bondholders*, although, in striking a balance, he charged interest since October 4th, 1873.

This was clearly error. If the $100,000, applied to the general indebtedness of the New Orleans Banking Association, and to that extent the bonds were held as security, then the security either was to be fixed as of the date when the balance was struck, which was first done before the master in 1882, there having been continually up to that time and indeed subsequently, dividends paid by the New Orleans Banking Association; or, it was to be struck as of the 4th of October, 1873, the date of the failure. The court has assumed the latter, thereby assuming, as far as the legal effect of the position goes, that on that day the owners of those bonds paid $100,000, of the indebtedness of $195,316.63.

If this be true, then to that proportionate extent, these sureties having paid the debt of the principal, became entitled to whatever assets or credits the principal had in his possession, and it appearing that there were two large dividends by the New Orleans Banking Association, their proportion should be credited to the owners of the bonds. (Pages 76–77.)

But to this logical conclusion, based upon the

learned judge's own premises, the decision did not proceed. It ignored the necessary consequences of thus fixing the date ; and credits, as we have above stated, the entire amount of the dividends to the $195,315.63 ; then, it appearing that notwithstanding the payments of these dividends, there was still $100,000. due, the learned judge held as we have stated above, thus making the bonds security for more than the $100,000. which was their express limit.

On the other hand, if it were correct to hold that the last hundred thousand dollars constituted the amount of indebtedness which the bonds were intended to guarantee, then it is clear that no interest should have been charged on that amount until the date when the balance was finally struck before the master, namely, in 1882.

If this position be sound, it would necessarily follow that any further dividends from the New Orleans Banking Association, should also be credited pro rata to the owners of the bonds, assuming that the bonds are liable in any way for the debt of the Banking Association to Schuchardt, or to his assignee.

XIV.

Schuchardt & Sons received in payment of coupons for interest on these bonds, sums amounting in the aggregate as follows : December 1st, 1873, $8,120. ; June 1st, 1874, $8,120. ; May 2d, 1875, $8,094.64 ; at various times in 1881 and 1882, $77,853.70 ; (pages 78 and 79, and page 142). This last amount was reduced by attorney's charges to $67,556. On the

three previous sums, the court below credited interest at the rate of six and seven per cent. On the last named sum the court allowed Fry to debit himself with 2½ per cent. interest, while still continuing against the bondholders an interest of 6 per cent. on the indebtedness. This 2½ per cent. was fixed by Fry, who was president of the bank, in his capacity as president of the bank in which they were deposited, a day or two before the time when he gave his testimony.

How he arrived at this, why it should have been 2½ per cent. rather than 4 per cent. or 3 per cent. or any other rate, does not appear from his testimony. If he had deposited the fund in one of the authorized depositaries, such as the United States Trust Company, he might possibly claim, with a show of plausibility, that he had earned for the fund all that he could procure, but having chosen to mix it with the funds of the bank of which he was president, an arbitrary allowance by him of so small a rate of interest, when he was claiming all that the law could possibly allow him, does not seem to be either reasonable or lawful or just.

The claim of the complainants, and of all those who are interested in the bonds, is that when the defendant Fry received the amounts aggregating $67,556.99, he should have at once applied them on account of the indebtedness, to which he has always claimed that they were applicable. He would thereby have reduced the interest on the indebtedness to that extent, but if he chose to keep the accounts separate, it was his duty to credit both sides with the same rate.

XV.

The contemporaneous exposition of the views of parties as to the meaning of their agreement is the only one which is valuable in law.

The best and surest mode of expounding an instrument is by referring to the time when, and circumstances under which it was made. To this effect is the old maxim of law: *contemporanea expositio est optima et fortissima in lege* (2 Inst., 11).

This ancient and reasonable canon of construction has been applied in late cases as one of the safest that could have been followed, whether the interpretation of a statute was involved, or ambiguous expressions in a contract.

See Broome's Legal Maxims, p. 682, citing cases.

As to the application of the maxim to the construction of public acts, *see*

Sedgwick on Stat. and Const. Law, 212 *et seq.*, 2d Rev. Ed.

Contemporaneous exposition of doubtful provisions *in all instruments*, and particularly in legislative enactments and constitutional charters, are held to be legitimate and useful sources of construction; 3 Pickering, § 18, cited as "singularly felicitous" and as "illustrating the old maxim *contemporanea expositio est fortissima in lege*."

Re Breslin, 45 Hun, 215.

After a catastrophe has occurred which has not been provided for by the parties, they are very frequently disposed to put a different coloring upon their operations and to adopt new views of their re-

spective rights and duties, and if the views of Cavaroc when about to fail are of any value, it is quite logical to claim that the claims of the defendant Fry of the liability of the bonds for a general indebtedness of the bank are the result of an afterthought, or of some recent discovery. When he proved his claim against the New Orleans Banking Association in the bankruptcy court of Louisiana, he was certainly bound by law and in good faith to state that he held this valuable security, if he really believed that it was applicable to the general balance in his assignor's favor; in lieu of this he proved it as a *claim without security*. As we have no disposition to make the slightest imputation upon his good faith, his view of the position that he took at the time is very apparent.

Light is also thrown upon the opinion of Schuchardt & Sons at the time of taking the drafts as to whether they had security for the payment of drafts in the bonds under dispute by the fact that it appears from the case of Casey *vs.* Schuchardt, 6 Otto, p. 494, that they at the time of receiving the drafts for 250,000 fr. on Seignouret Freres, which form under the date of December 29th, 1875, a basis of a claim for $54,230.41; (see Schedule A of Fry's account against the New Orleans Banking Association, page 101;) took what they supposed to be valid security for their claim in the shape of other securities, entirely distinct from the bonds in question belonging to the Banking Association, amounting to $60,000. which securities they only failed to realize on because the United States Supreme Court decided that the pledge was not completely made. The general grounds of the decision are more elaborately given in Casey *vs.* Cavaroc, 6 Otto, p. 467. This shows that they really intended

to carry into practice the distinction upon which we have already commented, viz., between business paper and the bank's drafts (fol. 75, p. 42).

XVI.

For the various errors shown in the petition of appeal, some of which are above discussed, it is respectfully submitted that the judgment should be reversed and the cause remanded to the Circuit Court, with appropriate instructions.

New York; 15th January, 1889.

EDGAR A. HUTCHINS,
Solicitor for Appellant.

FREDERIC R. COUDERT,
Counsel.

Office Supreme Court U. S.
FILED.
JAN 15 1889
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CLERK.

Supreme Court of the United States.

EDWARD H. REYNES, sole surviving Assignee of Charles Cavaroc & Son, bankrupts,

Appellants,

vs.

FREDERIC DUMONT, AUGUST HENRY REINE, JEAN DAVID MOCKEL and CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons.

FREDERIC DUMONT, AUGUST HENRY REINE and JEAN DAVID MOCKEL,

Appellants,

vs.

CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons, and EDWARD H. REYNES, sole surviving Assignee of Charles Cavaroc & Son, bankrupts.

Brief for Appellee Charles M. Fry.

JAMES C. CARTER,
Of Counsel for Appellee Fry.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER, 89 NASSAU ST., COR. FULTON.
1889.

Supreme Court of the United States,

OCTOBER TERM, 1888.

EDWARD H. REYNES, Assignee, &c., Appellant, *vs.* FREDERIC DUMONT *et al.*, Appellees.	No. 174.
FREDERIC DUMONT *et al.*, Appellants, *vs.* CHARLES M. FRY, Trustee in Bankruptcy, *et al.*, Appellees.	No. 175.

The two causes above entitled represent two different appeals taken by different parties in the same action. There was originally but one suit.

That suit was a bill in equity filed by Frederic Dumont, August Henry Reine and Jean David Mœckel, of Havre, France, for the purpose of enforcing their title and rights to and in certain bonds of the City of New Orleans, which they alleged to have been purchased on the joint account of themselves and Charles Cavaroc & Son, of New Orleans.

The bill, as originally filed, hardly presented a case for equitable cognizance and it was followed by an amended bill. This latter was of a rather anomalous and doubtful

character, and it is not at all certain that it exhibits a better case.

The principal allegations are that the complainants were the joint owners in equity with Francis Laborde and E. H. Reynes, assignees in bankruptcy of C. Cavaroc & Son, of New Orleans, of two hundred and thirty-two bonds of the City of New Orleans, which were in the possession of the defendant Charles M. Fry, trustee in bankruptcy of Messrs. Schuchardt & Sons, of the City of New York; that this joint ownership in equity arose from the fact that the bonds were purchased by C. Cavaroc & Son with the money of the complainants and for the joint account of C. Cavaroc & Son and the complainant, but were not purchased in their joint names, nor in the names of the complainants. These negative averments of how things were *not* done in order to suggest an inference as to how they *were* done do not possess the certainty which ought to characterize the allegations designed to support the jurisdiction of the Court. If the bonds were negotiable instruments payable to bearer, and the circumstance that they were alleged to be coupon bonds makes that probable, the *legal title* would be in the complainants, for having been bought with their money, they would be entitled to the possesion of them, or, if not this, such *legal* title would have been in the complainants and C. Cavaroc & Son, until the bankruptcy of the latter, and after that, and when the bill was filed, in the complainants and the defendants Laborde and Reynes, the assignees of C. Cavaroc & Son. The legal title to a bond payable to bearer and passing by mere delivery is in the party entitled to the possession, or in that of those who are the beneficial owners; and there would seem to have been no difficulty upon the allegations of the bill in maintaining an action of *trover* or *replevin* in the names of the complainants alone or in their names and the names of Laborde and Reynes, assignees. The circumstance that there were or might be matters of difference between the complainants and the representatives in bankruptcy of C. Cavaroc & Son in relation to the bonds, would have been no obstacle to the action at law, and was no justification for a suit in equity. Indeed that matter could

not properly be litigated in a suit in equity otherwise properly brought to enforce a title of the complainants and C. Cavaroc & Son against other parties who had no concern with those matters of difference.

These indirect and doubtful allegations of *equitable* title, which, if true, show that the complainants are *not* entitled to the possession of the bonds, are followed by an allegation of a demand upon the defendant Fry for the possession, and of a refusal by him to comply with the demand!

Then follow allegations that the defendant Fry pretends to have some claim or lien upon the bonds as the trustee in bankruptcy of Schuchardt & Sons, and that such pretences are unfounded, &c., and there are also allegations that Laborde and Reynes, assignees of C. Cavaroc & Son, the Louisiana National Bank of New Orleans and N. W. Casey, Receiver of the New Orleans National Banking Association, also pretend to have liens, which the complainants in like manner dispute; and the parties thus alleged to have set up claims to the bonds are made parties defendant.

The prayer for relief is in substance that the defendant Fry should set forth in an answer what his claims are, that Laborde and Reynes and the other defendants should set forth their claims, that the Court should adjudicate upon all the matters and make such decree as justice might require.

The real *motive* to the bill seems to be an impression that if the complainants and Laborde and Reynes should unite in a suit at law to recover the bonds from the defendant Fry, they would or might be defeated, and would then be obliged to redeem the bonds by making an inconvenient tender, and perhaps be obliged to prosecute another suit in equity.

Equity, indeed, has jurisdiction where the remedy at law is *doubtful*, but the *doubt* must be something different from doubt concerning the facts of the transactions. The defendant Fry either had a lien, or he had not; and in either case the remedy was clear. It may at times be a very convenient thing for parties to call upon a Court to inquire what the real facts of intricate transactions are, and

to declare and adjudge what rights they may have; but intricacy of transactions, and ignorance or doubt in the mind of a party whether he has any rights and what they may be, are not, of themselves, a sufficient ground for invoking the interposition of a court of equity.

One incident of a suit of this sort is that we do not know what the action is really about, and what matters are to be tried on it until the answers come in. Such is the case here; and when the answers are examined it is found that the defendant Fry sets up a lien upon the bonds of two descriptions; first, a lien to secure a balance due from C. Cavaroc & Son to Schuchardt & Sons, arising out of transactions of those two firms; and, second, a lien to secure a balance of account to the extent of $100,000, due from the New Orleans National Banking Association to the same firm of Schuchardt & Sons, and arising upon transactions between that association and that firm.

The answer of Laborde & Reynes, assignees of C. Cavaroc & Son, bankrupts, asserts that those bankrupts are entitled to half interest as joint purchasers thereof with the claimants, and asks to have the accounts in relation to such purchase between those bankrupts and the complainants adjusted, and their respective interests declared. In other respects this answer assumes an attitude similar to that of the bill, and shows clearly enough that Laborde & Reynes are united in interest with the complainants, and ought properly to have been joined with them as complainants. Neither the Louisiana National Bank, nor Casey, the Receiver of the New Orleans National Banking Association, make any answer.

Upon this doubtful foundation the cause was heard and determined, no serious question apparently having been made concerning the jurisdiction of the Court. That question, however, does not seem to have been waived, and inasmuch as the decree determined the rights and interests of the several parties in respect to the bonds, and appears to have been executed (see confirmation of sale and petition of appeal, pp. 162, 164), it may perhaps be open to the appellee to insist upon the objections to the jurisdiction, and that if those objections should be allowed as sufficient, that

the proceedings really amount to an arbitration and an award, and that inasmuch as the award has been executed, things must remain as they are and the appeals be dismissed.

Upon the facts a number of important questions arose, all of them relating to the validity and extent of the liens asserted by the defendant Fry, as the trustee in bankruptcy of Schuchardt & Sons. The full statement and discussion of the facts will be reserved for the more appropriate places in subsequent parts of this brief, but a general statement sufficient to impart a clear understanding of the questions should here be made.

It was proved that for many years prior to 1873 C. Cavaroc & Son had been engaged in business in New Orleans as merchants and bankers. Among other things they seem to have been largely engaged in the business of purchasing bills drawn by shippers of merchandise against the shipments, and also shipping merchandise, principally cotton, themselves, and drawing against their shipments. These drafts would be drawn, of course, on the ~~consumers~~ consignees of the merchandise abroad. C. Cavaroc & Son did not wish to await the payment of these bills abroad. It was necessary for them to realise on the bills immediately, either by a sale thereof or by a discount of the same. For this purpose they were in the habit of transmitting their bills to the market for such things, namely, New York, and of course they required there a financial agent and banker to effect the sales or furnish the discounts. Schuchardt & Sons were their agents and bankers for this purpose, and the course of business was for Cavaroc & Son to remit the bills and at the same time draw on Schuchardt & Sons against the remittances. The latter firm would pass the amount of the bills remitted to the credit of the drawing account of Cavaroc & Son, and charge against them in the same account the amount of any draft paid by them. If the bills remitted were not paid at maturity, Schuchardt & Sons, whose endorsement would always be on the bills, would be obliged to pay them, and upon such payment would charge the amount over against Cavaroc & Son on the same drawing account. This mode of business would, of course,

at times render the account of Cavarac & Son *overdrawn*, in the same way as if the latter firm had drawn on Schuchardt & Sons without remitting bills.

Cavaroc & Son did at times draw upon Schuchardt & Sons without remitting bills, for the purpose of putting themselves in funds in order to buy bills in New Orleans; the course of business in that place often requiring that the money for a bill be advanced before the actual shipment of the merchandise against which the bill was to be drawn; indeed it is a common practice everywhere for a buyer and shipper of merchandise to obtain from some banker or other person having confidence in him an advance of money with which to purchase the merchandise to be shipped; and afterwards when the goods are bought and shipped, to draw and deliver his bill with the shipping documents to the party from whom the advance has been obtained. In this way also the account of Cavaroc & Son with Schuchardt & Sons was liable from time to time to be overdrawn. An indulgence of this sort is not infrequent, the extent of it of course depending upon the degree of credit which the customer enjoys with his banker, or the possession by the latter of some collateral security.

The bonds in question had been placed by Cavaroc & Son in the possession of Schuchardt & Sons in 1870. What express contract or understanding there may have been at the time of the deposit is not clear upon the evidence. Different and inconsistent statements are made by the parties; but it is not disputed that from time to time loans had been made directly by or procured upon them by Schuchardt & Sons for Cavaroc & Son. And it is believed that there can be little doubt that they were thus held by Schuchardt & Sons, for the ordinary purposes for which bankers hold the securities of customers. The pretense of the junior Cavaroc that they were deposited for safe custody merely, finds no support in the evidence. There was nothing on the face of the bonds indicating that any other person than Cavaroc & Son had any interest in them, nor did Schuchardt & Sons have any notice of that fact.

Cavaroc & Son failed on the 4th of October, 1873.

What the precise condition at that time was of their account with Schuchardt & Sons does not distinctly appear; but when the account was made upon January 12th, 1874, there was a balance against the former of $7,454. This balance was subsequently increased by a further payment which Schuchardt & Sons were after litigation compelled to make of a $20,000 draft drawn upon them by Cavaroc & Son.

Schuchardt & Sons and subsequently Fry, as trustee, claimed a lien upon the bonds held by them for the payment of this balance, and this claim formed one of the principal subjects of contention in the court below. The decree fully sustained it.

Schuchardt & Sons claimed a further lien on the bonds to secure a balance of account in their favor against the New Orleans National Banking Association to the extent of $100,000. This association appears to have been engaged in doing much the same business in New Orleans in the way of purchasing bills drawn against shipments of merchandise as Cavaroc & Son. There were close relations between it and the latter firm. Indeed the senior Cavaroc was its president. It was clearly proved by written correspondence that Cavaroc & Son had in February, 1873, authorized Schuchardt & Son to hold the bonds as collateral security "*en cas de découvert*"; but it was insisted by the complainants and the assignees of Cavaroc & Son that this term must be used in connection with a privilege given to Cavaroc & Son by Schuchardt & Sons to draw *a découvert*, that the meaning of this latter phrase was to draw without remitting bills to cover the draft, and that in case of any such draft, if bills should subsequently be remitted, the security sought to be assured by the pledge would be given and the bonds relieved from the obligations. This rather singular view—singular at least in its consequences—was rejected by the Court, and the purpose of the hypothecations declared to be to secure any over-draft on the account however made which resulted in creating a balance against the Banking Association.

The third controverted question concerned the *extent* of

the security thus given. The Banking Association became insolvent on the same day with Cavaroc & Co. and was wound up. Schuchardt & Sons proved their whole debt against it, which was allowed at $195,315.63, and received dividends amounting to fifty-five per cent. It was insisted by the complainants and the assignees of Cavaroc & Son that a *part* only of this debt was secured, namely, $100,000, and therefore the dividends belonging to that part should be accounted for by the defendant Fry, who had received them, to the owners of the bonds. The contention on the other side was that the manifest purpose of the hypothecation and the real agreement was to secure the *whole* of any balance of account, but to limit the amount of the liability to $100,000. This latter view was sustained by the Court below.

Another question arose upon the claim of the defendant Fry, in the proceedings before the Master, to an allowance of interest upon the $100,000. The Master disallowed this claim, but his decision was overruled by the Court and the claim allowed.

A further question is open upon this appeal, although the point may not be pressed. It relates to an allowance to Fry, trustee, of counsel fees as a lien on the bonds or their proceeds. The City of New Orleans refused to pay any of the coupons of this issue of bonds, wholly repudiating its liability. The owners of the bonds requested Fry to take proceedings to enforce payment. He did take such proceedings, and after a long litigation succeeded in compelling payment. Besides requesting Mr. Fry to take this action, the complainants and the assignees of Cavaroc & Son call him to account in this action for the moneys thus collected. The Court held that the necessary expenses must be borne by the bonds.

There is still another question which the appellants may agitate. After the collection by the defendant Fry of the coupons above referred to he deposited the money in bank, receiving therefor and charging himself with interest at the rate of two and one-half per cent. The point was made that he should have applied the money to the payment of the debt so far as it would go ; that this would have extinguished

interest at the rate of six per cent. upon an equal amount of the debt, and that therefore he should be charged with interest at that rate, but he was advised that he had no power so to apply it, and so the Court held.

The Court below, after the hearing upon the pleadings and proof, rendered a decision upon the main questions arising thereon, and ordered an interlocutory decree with a reference to a master to take the accounts (see opinion, p. 66). It was not, however, until the hearing upon the settlement of the decree that the question of the extent of the security affected by the hypothecation for the benefit of the New Orleans National Banking Association arose. A further argument was had upon that question upon which a separate opinion was pronounced by the Court (see opinion, p. 70).

The interlocutory decree deciding the main questions and directing the reference to a Master was then entered (p. 73). The defendant Fry then exhibited his account pursuant to this decree (pp. 75–80). Divers exceptions were taken to this account by the complainants, and by the defendant Reynes, survivor of Laborde and Reynes, assignees of Cavaroc & Son (pp. 80 to 85). Much evidence was taken before the Master, who made his report on Oct. 13th, 1883 (pp. 125 to 128). The defendant Fry filed divers objections and exceptions to the report, in double form, one containing objections and requests and apparently viewing the report as provisional and subject to correction by the Master (pp. 128–130), another, consisting of exceptions only and viewing the report as final (pp. 130–132). The complainants and the defendant Laborde, survivor of Laborde and Reynes, also filed exceptions to the report (pp. 132–133).

Upon the hearing of these exceptions the Court rendered a decision (see Opinion, p. 139) ordering amendments and sending the report back for correction, and an order to that effect was entered (p. 140). The report was corrected in accordance with the order (pp. 142-144), and the complainants and the defendant Reynes, survivor, &c., again excepted both to the decision of the Court ordering the corrections, and to the corrected report (pp. 144–146).

A final decree was then entered declaring the rights of the parties, stating the sums for which the defendant Fry was entitled to a lien upon the bonds, ordering the moneys collected by him on coupons to be first applied to the extinguishment of the lien, and the bonds themselves, or enough to answer the purpose, to be sold, under the direction of the Master, and that out of the proceeds he should pay the residue of the debt for which the defendant Fry held the bonds, and the costs and disbursements of the action, and that the balance of such proceeds with any bonds unsold be paid over and delivered to the solicitors for the complainants and for the defendant Reynes, surviving assignee of Cavaroc & Son, in certain proportions, pursuant to a stipulation filed by those solicitors, those parties having agreed to such a disposition (pp. 146–149).

There were exceptions by the defendant Fry to the various rulings by the Master and the Court adverse to him, but as he has not appealed they become unimportant. This decree appears by the Master's report of sale and confirmation thereof to have been executed to the extent of selling ninety-two of the bonds and extinguishing, with the proceeds, the lien of the defendant Fry and paying the costs of the action. No receipt appears of the complainants or the defendant Reynes for the balance of moneys and bonds adjudged to be delivered to them (pp. 150–163).

The complainants and the defendant Reynes, assignee of Charles Cavaroc & Son, appealed to this Court (pp. 163–168).

First Point.—The defendant and appellee Fry, as trustee in bankruptcy for Schuchardt & Sons, had a lien upon the bonds in question for the payment of the sum of $25,715.22, being the balance due that firm on the account between it and C. Cavaroc & Son, as adjudged by the decree of the Court below (p. 147).

1. This lien is what is ordinarily known as a banker's lien. By long established law a banker has a lien

upon all funds and securities in his possession for the payment of a balance due to him on his generel account with a customer, unless it appear that the funds or securities are held by him for a purpose *inconsistent with such lien.*

Davis *vs.* Bowsher, 5 Term, 488.
Bolland *vs.* Bygrave, By. & Moody, 273.
Brandon *vs.* Burnett, 12 Ch. & Fin, 787.
Jones *vs.* Pepper, 1 John (Eng.), 430.
In re European Bank, Law Rep. (8 Ch.), 41.
In re Gen. Prov. Ass. Co., Law Rep. (14 Eg.), 507.
Story on Agency, § 391.
Jones on Liens, §§ 241 *et seq.*

a. All liens, except statutory liens, are created by contract; but the contract may be, and perhaps in most cases is, an *implied* one. The lien referred to is implied from the nature of the transactions between a banker and his customer, the usual relations between those parties, and the circumstance that such lien is, whenever occasion arises, asserted and enjoyed by the banker without objection from the customer.

b. It may be useful to call attention to the prominent features which business between a banker and his customer usually exhibit. These show at once the propriety of such a lien and define its character and extent.

A *banker* is one who deals in *money*, and carries on his business at some financial centre. Merchants require the aid of a person who will keep their money in safety while it is awaiting employment, and perhaps pay an interest on it; or lend money to them when needed, or procure loans from others. The banker serves all these purposes. He is the treasurer and the financial agent of his customer.

As treasurer, his business consists simply in receiving deposits of money and paying it out on drafts; and his account in relation to such business consists merely of credits for sums received and debits for drafts paid. As dealer in money and financial agent he may have transactions of many different kinds with his customers; but a very common kind is the lending of money by the discount of bills or notes, or the purchase of bills. Such transactions result in the giving of a credit on the general or drawing account of the customer, just as in the case of a deposit of money by the customer. The bill or note discounted or sold usually bears the endorsement of the customer and consequently he may be under a liability, in case it is not paid at maturity, to take it up himself and repay to the banker the amount received from him. This repayment is effected by the banker himself, who charges over against the customer the amount of the bill or note in the general or drawing account of the latter in precisely the same way as if the customer had drawn and given to the banker his check for the sum.

From this it will be understood that while the banker may have several accounts with his customer, the *general* or *drawing* account relates solely to *deposits of money* on one side, and *drafts of money* on the other, or their equivalents. Whenever in the course of the transactions, of whatever character, a debt becomes due *to* the customer, the amount is passed to his credit in this general account; and whenever, on the other hand, a debt becomes due *from* him it is passed to his debit in the same account. The *balance* of that account represents a *present debt* due and owing to the customer or the banker, as the case may be.

The banker also acts as a *collecting* agent, receiving bills or notes for collection, and usually advancing money on them at the time when the paper is received. The banker does his business for a very

small compensation. Interest on money loaned, at the legal rate, and sometimes less, is all he usually receives, except when he acts as collecting agent, and then his remuneration is very small. As a consequence of this he can afford to take but very slight risks, and is understood to take no others. The general or drawing account must at all times be kept good.

Nevertheless, from mistake, miscarriage of mail or defeat of expectations of the customer, a draft sometimes comes upon the banker to meet which there are no funds. Towards customers of approved character an indulgence in such cases is often extended and the draft honored; but immediate reimbursement is the rule. Still more frequently an adverse balance is created by the charging back to the customer of bills or notes which have been discounted, and which have not been paid at maturity; but the adverse balance, however produced, must be promptly made good. The degree of indulgence which the banker may extend to a customer depends of course upon the hazard attending it, and when the banker happens to have funds or securities of the customer in his possession which may be regarded as a security the indulgence is extended more liberally.

c. These conditions of business—the frequent occasions which the customer has to suddenly call for money, the possibility that discounted bills or notes will be returned unpaid, the necessity of maintaining confidence and credit with the banker so that he may not hesitate in furnishing discounts or pay an occasional over-draft—lead to the common practice on the part of customers of keeping securities of various kinds with their bankers, which may serve any purpose which the exigencies of business may require. Collateral which has been furnished for loans or discounts is allowed to remain after the loans have been paid; uncollected

paper, bonds, stocks and other securities, and sometimes other valuables, are left in the possession of the banker.

d. Inasmuch as in the vast majority of cases such securities and property of the customer found in the possession of the banker have been delivered to or left with him for no other purpose than to secure him generally against loss—the law justly assumes *in all cases* that this is the purpose for which they have been so delivered or left. At the same time it recognizes the fact that the purpose may have been different; and hence the rule defining the banker's lien as above stated, namely, that he has a lien on all securities in his possession for the payment of the *balance* of his account, *unless* it appear that the securities were deposited or left for a purpose *inconsistent with such lien.*

e. It should be clearly understood that this lien is not one for *debts and liabilities generally*, but only for the *balance* of the general or drawing account. If the banker has made a loan upon collateral or discounted a note with collateral attached, upon the payment of the loan or note the customer has a right to a return of the security, although he may be under many other liabilities to the banker not yet matured, provided there is no adverse balance of account. So far as the banker's general lien is concerned, it exists only in respect of a money balance presently due on the general account. This makes it entirely safe for the customer to leave with his banker any security whatever. It is subject to his order so long as he keeps his account good.

There are circumstances, such as insolvency, which would introduce other considerations. The certainty in such case that an adverse balance, though not at the time existing, would afterwards arise, and the new relations to which insolvency

gives rise would allow the lien to be extended to liabilities not matured. This is one of the very purposes of the bankers' lien.

2. These considerations leave no doubt respecting the existence of this lien upon the securities in the hands of the appellee Fry. The relations between his assignors, Schuchardt & Sons, and Cavaroc & Son were a typical instance of those usually existing between banker and customer. The securities were in the *possession* of Schuchardt & Sons at the time of the bankruptcy of Cavaroc & Son. No rights of third parties have intervened other than those of the creditors of Cavaroc & Son, and these are subordinate. Cavaroc & Son could indeed before bankruptcy have demanded a return of the bonds at any time when there was no balance against them in the general account; but after bankruptcy they could not have demanded them if Schuchardt & Sons were under liabilities which might result in creating an adverse balance against their customer.

3. It was indeed open to the complainants, and to the assignees of Cavaroc & Son, to prove that the bonds were held by Schuchardt & Sons for a purpose or under a contract *inconsistent* with the alleged lien. An attempt in this direction was made; but it was quite unsuccessful. Charles Cavaroc, Senior, testified that they were deposited by him *for safe custody;* but this can be regarded at the most as but the expression of his *opinion* or of *his purpose*. If that was the contract, it must have been such for the reason that he declared at the time to Schuchardt & Sons that such was his purpose, and that they assented to it when receiving the bonds, or that there was some writing evidencing a contract to that effect. He acknowledged himself unable to state any conversation to that, or any other, effect when the bonds were deposited, or to produce any writing, or to remember any writing, evidencing such a contract (p.

23). This evidence simply proved the deposit by him of the bonds without more, and this tends only to prove the existence of the lien.

Charles Cavaroc, Jr., was examined on behalf of the assignees of Charles Cavaroc & Son, but not on behalf of the complainants. It is observable that the interrogatories propounded by those who called him did not even seek to draw from him the purpose for which the bonds were deposited (see interrogatories, pp. 37, 38). This seems to show that they were not aware that he possessed any knowledge on that subject which would be of benefit to them. This witness, however, availed himself of the opportunity afforded by the last general interrogatory to assume that he knew more about the matter than any other person, and that "justice to all parties" required him to state what he thus knew. He thereupon proceeded to contradict his father, who had sworn that he personally deposited the bonds with Schuchardt & Sons in 1870 for safe keeping, and said that the bonds were sent on in that year to New York *by express*, and that he went on, presumably about the same time, to obtain a loan upon them, and did obtain such loan through Schuchardt & Sons; that in 1871 this loan was paid to that firm and the bonds released! He further said that after this the bonds remained with Schuchardt & Sons *for safe keeping*, but as he does not pretend to have made any contract with them to that effect, or to have had any conversation or communication, written or verbal, from which such a contract or purpose could be inferred, his testimony may be dismissed with the observation that it proves only that the bonds were originally deposited with Schuchardt & Sons to procure a loan of money (pp. 39 and 42).

But Mr. Lawrence Wells, of the firm of Schuchardt & Sons, was examined as a witness and he speedily disposed of this notion of a deposit *for safe keeping* by proving that they were deposited with his firm by Charles Cavaroc, Jr., as the latter had testified; and

that on the very day when they were thus deposited they were used as collateral to procure loans, as Cavaroc, Jr., had also testified, but that so far from their having been released from loans in 1871, and afterwards held for safe keeping, they were used over and over again as security for loans by order of the Cavaroc firm, and some of them were returned to or otherwise disposed of by order of that firm. It seems that bonds to the amount of $275,000 were originally thus deposited (pp. 51–53). What was *actually done* with the bonds by the direction or with the assent of C. Cavaroc & Son is quite satisfactory evidence of the purpose for which the deposit was made, and this testimony shows very clearly that the bonds were deposited as a customer usually deposits securities with a banker, for the purpose of being used from time to time, as exigency may require, in procuring loans and credits. These are the very circumstances and reasons upon which the law has declared the existence of the banker's lien. The law properly assumes that no such adverse balance would have been allowed by the banker to arise except for the possession of the securities held by him.

4. It would be to no purpose for the appellants to urge that a demand was made upon Schuchardt & Sons at the time of the bankruptcy and that *at that time* there was no adverse balance against Cavaroc & Son, and that Schuchardt & Sons could not retain the bonds as security for a debt not then matured. This suggestion overlooks the material circumstance of the intervening bankruptcy.

As long as the regular course of business is proceeding it is true that the strict banker's lien, confined as it is to the *balance* of account, does not exist where there is no such balance, and cannot be asserted in relation to liabilities of the customer to the banker not yet matured. But the regular course of business is rudely interrupted by insolvency. The *unexpected*, and therefore the *unprovided* for, has taken place,

and although in such cases there may be a difficulty in allowing set-offs *at law*, the occasion is one in which equity interferes for the purpose of effecting justice. If there be what is called *a natural equity* that Schuchardt & Sons should be protected by these bonds against the liabilities which they had incurred, courts of equity will see that justice is enforced.

Is there then any such natural equity? Carefully omitting from view the consideration hereafter to be dealt with that the liabilities referred to were incurred upon the faith and credit of the bonds, and that the latter were thus subjected to a *particular* lien for the discharge of such liabilities, and looking only to the *banker's lien* now under consideration, a very sufficient equity is perceived. It was then absolutely *certain* that an adverse balance would exist in a short time, and that it would not be paid at least in full. Shuchardt & Sons had taken drafts of Cavaroc & Son on Dumont to the amount of 200,000 francs, which the latter firm had no right to draw and which would not be paid. They had in effect *lent* to that firm that sum of money which would in a short time have become payable. In *equity* Cavaroc & Son really owed them that sum of money, which, however, was not then presently payable. Is the mere circumstance of the immaturity of this obligation of such consequence that Schuchardt & Sons must lose the debt, when if it had matured a short time sooner they would be fully paid? It does not seem to appear whether the assignees of Cavaroc & Son had been appointed, or their bankruptcy even declared, prior to the maturity of these obligations, but even if it had, what equity would such assignees have had which could be regarded as equal to that of Schuchardt & Sons? In the view of a court of equity the occurrence of insolvency which made it impossible that the credit side of the account with Cavaroc & Son should be improved, is a sufficient reason for imposing a stoppage at that point and de-

claring that the *real* balance is that which it must inevitably turn out to be. Different views have been expressed by courts as to whether a party owing a debt presently due to an insolvent could *set off* against it, even in equity, a debt not yet due from the insolvent to him. But surely there would seem to be no just ground for doubt that in such cases the party to whom the debt is not due so that it can be set off is entitled to hold as a security where his debtor is insolvent what he might hold as security if the debt were due.

1 Jones on Liens, § 246.
Ford *vs.* Thornton, 3 Leigh. (Va.), 695.
Fourth Nat. Bank *vs.* City Nat. Bank, 68 Ill., 398.
Rothschild *vs.* Mack, 42 Hun, 72.
2 Story Eq. Jur., §§ 1431–1444.

Third Point.—But Schuchardt & Sons had a direct lien upon the bonds in question to secure the new liabilities incurred by them for Cavaroc & Son and which, not matured at the time of the bankruptcy of the latter, created subsequently when mature the adverse balance of account.

1. What the precise state of the account was at the time of the bankruptcy of Cavaroc & Son or when the title of the assignees of that firm accrued does not appear. All we know is that the first account made up after the bankruptcy and dated Jan. 12th, 1874, showed a balance against the firm of $7,452.22. This unfavorable balance appears to have been created by charging back to the firm three protested drafts which Schuchardt & Sons had been compelled to pay, and such payments appear to have been made in Jan., 1874 (see Ex. B, between pp. 30 and 31). The residue of the debt found by the Master to be due to

Schuchardt & Sons arose from a liability assumed by them for Cavaroc & Son prior to the bankruptcy in favor of the Louisiana National Bank, but which was not paid until long afterwards under legal compulsion, and sundry items of interest and expenses (see Schedule B, p. 105; Answer of Fry, pp. 9 and 10; Leupp's Testimony, pp. 57 and 58). The principal sums creating the debt were, therefore, those paid in taking up the three protested drafts, two on Dumont & Co., the complainants, for 100,000 francs each, one on Maxquelier Fils for 30,000 francs and the sum of $9,500 paid after judgment on an acceptance for Cavaroc & Son. The three drafts were, all of them, drafts upon parties in France, and which were cashed by Schuchardt & Sons and the amounts passed to the credit of Cavaroc & Son without any bills of lading accompanying them, or other security, except such as might have been in the possession of Schuchardt & Sons, including the bonds in question (Cavaroc & Son, pp. 24 and 25). The acceptance was presumably of the same character. The suit was to recover the whole amount of the draft (pp. 57-58).

2. It thus appears that Schuchardt & Sons had incurred these heavy liabilities with no security whatever, unless these bonds were such, beyond the personal credit of Cavaroc & Son. The question therefore is, was it or not the understanding between Cavaroc & Son and Schuchardt & Sons that for any advances of money which the latter might make to the former and liabilities incurred in the negotiation of drafts not drawn against merchandise the bonds in question were to stand as security. Taking into consideration the facts already noticed, this question answers itself. Such must have been the understanding.

a. There are two general forms of financial transactions which are common between a banker and his customers, both of which are illustrated by the deal-

ings between Schuchardt & Sons and Cavaroc & Son, and also between the former and the National Banking Association. The one consists in the receipt of financial paper, notes, bills, &c., for collection, discount, or negotiation, and results in a legitimate credit to the customer of the amount *advanced in anticipation* of the collections, or of the amount of the *proceeds* of an actual discount or sale. For this form of business no other security is required than the paper received. It is presumed to be paper springing out of business transactions and is usually good; and in the case of merchandise bills secured by the shipping documents. This form of business *creates* a balance in favor of the customer against which he may, and usually does, *draw*.

The other form consists of drafts *unaccompanied by any such securities*, and without any balance in favor of the customer arising out of prior transactions. Drafts of this latter character are of course not legitimate, unless in consequence of some agreement giving permission so to draw, and such agreement is not given without security that the sums paid out upon such drafts will be repaid. If securities are lodged with the banker to secure him for such advances the lien acquired is something more than the ordinary banker's lien for his balance.

We shall presently see in the discussion of the lien for the debt due from the National Banking Association that these *extraordinary* drafts unaccompanied with financial paper qualifying them, and without a balance to draw against, are discredited as drawings "*a découvert*," the substance of the meaning of which phrase is a drawing of money when there is no balance to draw against.

Such a drawing to the extent of $100,000 by the National Banking Association was authorized upon the special agreement that the bonds should stand as collateral security.

There are quite sufficient grounds for the implication that there was a like agreement, although the amount for which the drawing should be permitted is not indicated in relation to drafts of this character by Cavaroc & Son. The dealings with the latter and with the Banking Association were of the same character. There was the same necessity for such security, and the same improbability that such drafts would be honored without it. The bonds had been lodged with Schuchardt & Sons for the purpose of securing loans and advances of money to Cavaroc & Son as from time to time they might be needed, either directly from Schuchardt & Sons or from others through them. Drafts of the character last indicated were simply *requests* from Cavaroc & Son to Schuchardt & Sons for *loans* of *money*, and it is impossible not to believe that it was implied as part of the request that the bonds should stand as security for the loans according to the previous course of dealing. To make any other supposal would be imputing to men a folly, and to bankers (and both parties were such) a mode of transacting business which is never, pursued.

3. If, therefore, the ultimate debt to Schuchardt & Sons was created by drafts drawn upon the *latter* of the *a découvert* character above described, the bonds would stand as security for it until it was finally *paid*. The subsequent transmission of foreign bills subsequently dishonored would not pay it and release the security ; even if Schuchardt & Sons had negotiated the bills, they would be obliged, having endorsed them, to take them up. But if the debt was created by naked drafts drawn upon *other parties* by Cavaroc & Son, and cashed by way of discount or otherwise by Schuchardt & Sons, the substance of the transaction would still be the making of a loan to Cavaroc & Son upon the security of the bonds. It is inferable from the evidence that the debt may have arisen in

the manner thus described, and that the drafts thus cashed were drawn for the very purpose of raising money *to pay for the bonds*. We have the testimony of C. Cavaroc, Sen., to the effect that these very bonds (275 originally) were bought by drafts for about 1,000,000 francs, drawn by Cavaroc & Son on the complainants, and which were negotiated in part at least by Schuchardt & Sons. From time to time, as the drafts matured, they were paid for or renewed by other drafts drawn in like manner, and none of them were absolutely paid until after the failure of Cavaroc & Son. The complainants then paid them to amount of 484,000 francs (presumably their half of the price). Cavaroc & Son never paid anything on account of the drafts; but Schuchardt & Sons paid 200,000 francs of them and held the protested drafts. The residue of the drafts were held by other parties. Their drafts to the extent of 200,000 francs thus paid and held by Schuchardt & Sons were the principal subject of the last charges in the account between Schuchardt & Sons and Cavaroc & Son (Ex. B.), and made the principal part of the balance against the latter firm. (Cavaroc, Sen., testimony, pp. 24, 25, 26, 27). And, what seems to be absolutely conclusive, Cavaroc says: "Cavaroc & Son paid 200,000 francs of drafts, and those 200,000 francs are the same charged to us by F. Schuchardt & Sons, *and were drawn against those very same bonds*, and they are the 200,000 francs mentioned in the account hereto annexed, marked Exhibit B." He means by this the two protested drafts for 100,000 francs each, charged back to Cavaroc & Son.

Inasmuch as it is not pretended that there was any special arrangement for securing these particular drafts for 200,000 francs by these bonds, beyond the fact that the bonds were in the possession of Schuchardt & Sons, as a means of securing loans and advances and these drafts were drawn without any balance to protect them, and unaccompanied by shipping documents to make them good, we are well war-

ranted in the conclusion that what is true generally in such cases was true also in this, namely, that when Schuchardt & Sons honored drafts upon the mere name of Cavaroc & Son, and without other security, it was fully understood to be upon the security of these bonds. This creates a lien more extensive than the strict banker's lien, and enabled Schuchardt & Sons to hold the bonds for *liabilities* thus incurred, although they had not so matured as to be chargeable against Cavaroc & Son, in the general drawing account. This fully justifies so much of the decree as declares the defendant Fry entitled to a lien upon bonds for the full amount of the debt due from Cavaroc & Son.

4. It should be observed that the lien of the defendant Fry for this debt was not strenuously contested in the Court below, but the question is open upon the record ; and the possibility that it may be mooted in this Court by the appellants is the apology for devoting so much attention to it.

Fourth Point.—The questions most seriously contested in the court below were those relating to the further lien asserted by the defendant Fry, as assignee, upon the same bonds for the debt due to Schuchardt & Sons from the New Orleans National Banking Association and the extent or magnitude of it. The facts proved clearly establish the *existence* of the lien.

1. That it was the intention and agreement of Cavaroc & Son to pledge the bonds to secure *some* obligation of the Banking Association to Schuchardt & Sons is not questioned. The written documents are conclusive upon that point.

2. The notion of the appellants suggested by the testimony of Cavaroc, Sr., is that the pledge was that

in case of drafts drawn by the Banking Association *in anticipation* of remittances of merchandise bills, such bills should eventually be remitted, and that the obligation would be *performed* by the remittance of such bills and the bonds released from the obligation incurred, and then stand as security for new transactions of the same character. According to this view the bonds could not be held as security for an adverse balance of account created by the taking up and payment of dishonored bills by Schuchardt & Sons.

3. This notion involves the following consequence, which seems so contrary to the presumable intentions of the parties as to make the theory wholly inadmissible. Inasmuch as Schuchardt & Sons, upon the payment of any dishonored bills for which they had previously given credit to the Banking Association, would properly recharge against the latter in the general account the amount of such bills, there might result an adverse balance on this account of, say, $100,000; and yet Schuchardt & Sons would still be obliged, under the credit *a découvert* which they had given, to go on and honor the drafts of the Banking Association drawn in anticipation of future remittances of exchange to the extent of $100,000 more!

4. To arrive at a just understanding of the real contract of hypothecation, the correspondence which created it should be read in the light of the business and circumstances out of which it arose. It will then clearly appear that the pledge was made to secure to Schuchardt & Sons the payment of any *balance of account* which might arise against the Banking Association in consequence of the payment of drafts drawn by it upon the former when it had no right to draw.

a. The general business between the parties consisted in transmission by the Banking Association

to Schuchardt & Sons of bills of exchange drawn on foreign houses *against shipments of merchandise;* that is, bills drawn with *shipping documents*, bills of lading, &c., attached. The purpose of the transmission was that Schuchardt & Sons should discount or sell the said bills. Such bills are always supposed to be perfectly good, and they are readily saleable at the ordinary rate of exchange. Schuchardt & Sons, upon the receipt of the bills, immediately took them themselves or sold them to third persons, and consequently the the amount of such bills was at once passed to the credit of the Banking Association in the general account. A balance was thus created against which the Banking Association could draw, and it did in fact so draw at the time of remitting the bills.

The Banking Association, however, was obliged to advance money to shippers of merchandise before the goods were shipped, and of course before the shippers could deliver to the Association bills drawn against the merchandise. To increase its facilities for prosecuting this business it wished a similar credit with Schuchardt & Sons, and the bonds were pledged in order to gain for it that credit.

b. The precise terms of the pledge are stated in the letter of Cavaroc, Sen., of February 15th, 1873 (p. 62), and by this the bonds are to be held as collateral security "*en cas de découvert*," and the object declared by the correspondence, to gain which the pledge was made, was to obtain for the Banking Association the privilege of drawing "*a découvert.*" The literal meaning of these expressions shows the real intent of the pledge was to secure the payment by the Banking Association of any adverse balance of accounts created by its overdrafts; that is, by drawing when it had no balance to draw against. The phrase "*a décou-*

vert" is, according to the best authorities (p. 53), a commercial one used in relation to *accounts*, and means an *overdrawn* account. *To draw*, therefore, "*a découvert*," which was the privilege sought and gained by the pledge, is to draw when there is no balance to draw against. The substantive "*découvert*" means (p. 52) an *uncovered balance of account*, which is, of course, an adverse balance of account. There seems to be no support for the effort of the appellants to limit a drawing "*a découvert*" to the case of a draft unaccompanied by a merchandise bill. If the Banking Association should draw such a draft, and yet had at the time a balance in its favor equal to the amount of the draft the drawing would surely not be "*a découvert*"; but a draft drawn without an existing balance, and which would therefore be "*a découvert*," considered by itself, would, if accompanied by a merchandise bill, cease to be "*a découvert.*" But this would be for the reason that the bill would instantly create a balance in favor of the Banking Association on the general account.

5. The conclusion is that the pledge was designed to secure the payment of any *balance of account* created by drafts drawn by the Banking Association when it had no balance to draw against; in other words, *overdrafts*. This produced the "*cas de découvert*" against which the pledge was in terms made by Cavaroc's letter of February 15th, 1873.

6. Of course it made no difference whether the unfavorable balance actually existed at any moment, or would be brought about by the taking up upon the maturity at a future time of dishonored bills drawn upon foreign houses by the Banking Association. The receipt and sale of such bills by Schuchardt & Sons would result in passing the amount of them to the credit of the association, and thus creating, in form, a credit in its favor; but such drafts when

taken up and paid by Schuchardt & Sons, as they always would be, inasmuch as that firm was obliged to endorse them in order to negotiate them, would be charged back as debits in the same account. It would, in such cases, be all the same to say that the bonds were held to secure any eventual balance of account created as above mentioned, or to secure the bills upon which Schuchardt & Sons were contingently liable.

7. Even if we should adopt the interpretation of the contract suggested by the appellants, the result would be the same. Inasmuch as the drafts, *a découvert* by the Banking Association were confessedly to be drawn in anticipation of the remittance of bills drawn against merchandise, the bonds would not be released from the obligation until *such* bills had been remitted. Now the entire balance against the Banking Association, for which the judgment of the Court below declares a lien on the bonds, was created by the taking up of *clean* bills, that is, bills drawn by the Banking Association unaccompanied by any shipping documents, which Schuchardt & Sons had negotiated and passed to the credit of the association, and against which the latter had drawn its drafts. The condition of the pledge as to these drafts would not be satisfied, even on the theory of the appellants, until merchandise bills had been remitted sufficient to cover them, which was never done.

It will be seen from the evidence (pp. 56, 57) that on the 1st of October, 1873, the balance against the association was $4,121.92. This balance was reduced to that point by giving the association credit for the following *clean* bills drawn by it on foreign houses:

On G. Honorat & Co.....	$33,846 15
On Seignouret Freres & Co.....	56,410 26
On A. Dutfoy & Co.	90,256 41
On S. Frank & Co.....	12,500 00
On National Park Bank.....	353 00
	$193,365 82

All these bills were dishonored, taken up and paid by Schuchardt & Sons before January 12th, 1874, and properly charged back against the association, and this would leave the adverse balance of account thus:

Balance of October 1st, 1873.....	$4,121 92
Subsequent debits.....	193,365 82
Total.....	$197,487 74

8. That this amount, however the result may be worked out, was the true liability or debt which the pledge of the bonds was designed to secure is placed beyond any question by the decisive assent of the senior Cavaroc himself made at a time when no controversy was in contemplation. At a meeting of the directors of the Banking Association on September 20th, 1873, at which he was present, as president, it was resolved that securities should be placed in his hands to secure him against eventual loss of these very bonds which were declared to have been "*pledged to F. Schuchardt & Sons, agents of the* "*bank at New York, as collateral security for the* "*payment of all foreign exchange bills sent them* "*for negotiation and by them endorsed.*"

It is idle for the appellants, on the face of this evidence, to insist, as their theory obliges them to, and as the senior Cavaroc, when testifying, did, that at this very time there was no debt or liability for which these bonds stood pledged (pp. 24, 25).

Fifth Point.—The total debt due from the National Banking Association to Schuchardt and Gebhardt, as proved in bankruptcy, amounted to $195,315.63, and upon this the appellant Fry, as assignee of that firm, received dividends amounting to 55 per cent. from the bankrupt estate. It was insisted upon by the appel-

lants that these dividends should have been apportioned, and a ratable part applied to diminish the debt secured by the pledge. The decree of the Court below overruling this claim, and declaring the bonds subject to a lien for the payment of the residue of the debt remaining unpaid after the application of the entire amount of the dividends, was correct.

1. Subrogation, for that is the substance of the demand which is made by the appellants, is an equity to which the surety is entitled when he pays *the debt for which he became surety.* And, necessarily, in all cases where the right of subrogation would arise if the surety had first paid the debt, and the creditor had afterwards received moneys on account of it from the debtor, the moneys, if received by the creditor before payment by the surety, would go in exoneration of the latter.

   One good way, therefore, of testing the question whether the equity of subrogation arises in the present case, is to inquire whether any payments by the Banking Association of its debts to Schuchardt & Sons would have relieved the bonds from any part of the lien so long as a balance of $100,000 remained due. Plainly ~~that~~ would not. It was the very contemplation of the contract that such payments would be made, and that when made, the bonds should still stand as security for the unpaid balance. No payments, therefore, if made directly by the Banking Association, would have at all tended to release the bonds so long as an unpaid balance of $100,000 remained. And if this was the case *before* the bankruptcy, it must have been so afterwards. Bankruptcy or insolvency could have no effect to change the contract; nor can any equity of subrogation arise against the agreement of the parties.

2. The *true description* of the debt for which the bonds were pledged is *that part of the indebtedness of the*

Banking Association created by its overdrafts which it might not pay. In other words, as the learned Judge in the Court below described it, *the unpaid balance.* In case the bonds should pay the *whole* of this unpaid balance, then, indeed, and not until then, would Cavaroc & Son be entitled to be subrogated to Schuchardt & Sons, and to receive any further dividends which might come from the bankrupt estate. Such an engagement, by its very nature, supposes the right of the creditor to receive voluntary payments from the debtor without any exoneration of the surety, and enforced payments as well, for the guaranty applies only to the balance *after* such payments have credited.

To be sure, where the debt for which one becomes surety is *specifically* described, as, for instance, the sum of $10,000 now due or to become due from A. B. to C. D. on the sale of a ship, it may be said that the engagement of the surety is to pay what A. B. does not pay; but this is a *consequence* of the engagement and not the *description* of the debt guaranteed. In the present case, however, *so much of the debt as the Banking Association does not pay* is the *description* of the debt guaranteed. When the bonds pay *that* debt they will have paid the debt for which they were pledged, and the equity of subrogation will arise if there should be any subject for it.

3. There are various modes in which a surety may limit the extent of his liability. He may *specifically* describe the debt for which he becomes surety and become surety for the whole, and on paying that he will be entitled to subrogation, whatever other claims the creditor may have on the debtor. In such case dividends from the bankrupt debtor's estate would have to be apportioned. So, too, he may limit his engagement to a specified *part* of that debt, and such dividends would in that case be apportioned. He may even make a *continuing* guaranty, and if he *limits the amount of*

the indebtedness to be created, then, if the amount be exceeded, the whole debt as between the surety and the creditor must be taken to be the amount limited, and in such case dividends received from the bankrupt debtor's estate would have to be apportioned.

But sometimes what the person asked to give credit may desire is *security against ultimate loss;* and the surety may be willing to give him such security. If the dealings are likely to involve a large and *indefinite* liability, prudence dictates to the surety precaution, and he exercises this by limiting his liability, leaving the creditor to allow whatever indebtedness to arise he pleases. Both know that the surety can be called upon only for the specified amount, and both also know that the surety can claim nothing from the debtor's estate until the creditor is fully paid.

4. This latter form of engagement was evidently what the parties intended. The Banking Association wanted to draw *a découvert*, that is, to *overdraw*. Schuchardt & Sons proposed to give it the *right* to do so, provided security was given to them against ultimate loss. Cavaroc & Son were willing to secure them against such loss, but not to subject themselves to hazard beyond the sum of $100,000. It is true that the *right* to overdraw was given only to the extent of $100,000 only; but this limitation was not imposed by Cavaroc & Son or at their instance. The bank wanted all the credit of this description it could get, and what the bank wanted the Cavarocs wanted. The senior Cavaroc was its president and principal manager. All he wanted was to limit his ultimate liability. The limit was imposed for the benefit of Schuchardt & Sons. Of course they could not give a privilege to a customer to draw upon them for an unlimited amount. Such a license might speedily have ruined them. That this was the fact is manifest not only from the nature of the business but from the acts of the parties under the engagement. The

Bank, and of course the Cavarocs could not be ignorant of it, the senior Cavaroc must have directed it, at once proceeded to overdraw largely in excess of the $100,000.

5. The authorities upon the question now under discussion are principally English. They proceed, it is believed, upon a full recognition of the above views. Any minute discussion of them here would too much extend this brief. The following are the principal:

   Ex parte Bushford, 10 Ves., 409.
   Wright *vs.* Morley, 11 Ves., 12.
   Ellis *vs.* Emanuel, Law. Rep. (1 Exc.), 157.
   Ex parte Hope, 3 M., De Gex & G., 720.
   Midland Banking Co *vs.* Chambers, 38 Law J., Ch. 478.

6. It is believed that in all the cases of limited guaranties in which it has been held that dividends received from an insolvent's estate, or other payments so made that the law and not the parties are to apply them, are to be apportioned, the contract has been viewed as a guaranty of *a specified part of a defined debt*, and not of a whole debt with a limitation of liability.

7. It was insisted in the court below, that had Cavaroc & Son paid $100,000 in the first instance, they would have been entitled to be subrogated to that extent to the claims of Schuchardt & Sons against the bankrupt estate. But this argument begs the whole question. If the pledge was to secure the whole debt, with a limit of liability, Cavaroc & Son would not have been entitled to such subrogation. It would be necessary for them, in order to gain it, to pay the whole debt.

Sixth Point.—Interest on the sum for which the bonds were a lien was properly allowed by the Court below.

1. This follows from the circumstance that the contract was a *pledge* of bonds to secure a *debt*. When the

account was closed in January, 1874, the whole debt was due and interest was running upon it. It was then immediately enforceable against the security. The creditor should lose nothing by the delay. The pledgor could have stopped the accruing interest by paying the debt.

2. If the pledge had been to secure the whole debt, with no limitation of liability, no one would suggest that interest would not run and increase the amount of the lien. Surely there is nothing in the limitation of responsibility to $100,000 which would have a different effect. This limitation is to the *principal* amount of debt, not to principal and interest.

Seventh Point.—In relation to other incidents of the accounting under the interlocutory decree, the decisions of the Court below were correct.

1. The Court was right in holding that the defendant Fry was chargeable with so much interest only on the sums collected by him upon the coupons as he actually received. Holding the bonds as a pledge, he had no right to *apply* them or their proceeds to the extinction of the debt. Nor is a creditor bound to accept payment in installments.

2. The decision that the defendant Fry was entitled to an allowance of the expenses incurred in enforcing by suit a payment of the coupons, was correct. The proceedings taken by him were at the request of the complainants (p. 90).

Lastly.—The decree appealed from should be, in all things, affirmed, with costs.

JAMES C. CARTER,
Of Counsel for Appellee Fry.

Office Supreme Court U. S.
FILED,
JAN 17 1889

Supreme Court of the United States,

OCTOBER TERM, 1888.

EDWARD H. REYNES, sole surviving Assignee of Charles Cavaroc & Son, bankrupts,

Appellants,

vs.

FREDERIC DUMONT, AUGUST HENRY REINE, JEAN DAVID MOCKEL and CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons.

FREDERIC DUMONT, AUGUST HENRY REINE and JEAN DAVID MOCKEL,

Appellants,

vs.

CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons, and EDWARD H. REYNES, sole surviving Assignee of Charles Cavaroc & Son, bankrupts.

Brief for Sole Appellee Charles M. Fry.

JOHN M. BOWERS,
Of Counsel for Charles M. Fry, Appellee.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER, 89 NASSAU ST., COR. FULTON.
1889.

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

OCTOBER TERM, 1888.

EDWARD H. REYNES, sole surviving Assignee of Charles Cavaroc & Son,
Appellant,

vs.

CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons,
Appellee.

No. 174.

FREDERICK DUMONT, August Henry Reine and Jean David Mockel,
Appellants,

vs.

CHARLES M. FRY, Trustee in Bankruptcy of Schuchardt & Sons,
Appellee.

No. 175

Brief on behalf of Charles M. Fry, Trustee, sole Appellee.

STATEMENT.

The appellants, Frederic Dumont, August Henry Reine and Jean David Mockel, instituted their suit in the year 1877, in the Circuit Court of the United States, for the

Southern District of New York, on the equity side, making as parties defendant the other appellant in this case, Edward H. Reynes and Francis Laborde, as assignees of Charles Cavaroc & Son, and the appellee, Charles M. Fry, trustee in bankruptcy of Schuchardt & Sons.

There were other defendants named, but they took no part in the litigation and had no interest therein.

Laborde apparently died pending the action as is clearly indicated in the decree of March 5th, 1884 (see p. 149).

The subject matter of the action were 232 bonds of the City of New Orleans.

The appellants together claimed to be the owners of such bonds, and waived, on the hearing below, the settlement of any difference between them as to such ownership, finally stipulating a division between themselves of the surplus, thus reducing the contest to one between the two appellants on the one side, and the appellee Charles M. Fry on the other side, and for the purposes of this argument the appellants will necessarily be treated as the claimants of such bonds, and the appellee Charles M. Fry, trustee, &c., as a lienor in possession thereof. These two appeals, therefore, present the same question and are both taken from the same decree.

By their amended bill the appellants made a sort of double claim, saying (folios 6 and 7) that the appellants Dumont & Co. were the joint owners with the appellant Edward H. Reynes, as assignee, of the bonds in question, and that Fry had refused to deliver them on demand made by them; and later (fol. 7) they admit he claimed to hold the bonds as security for certain sums due him from the firm of Cavaroc & Co. and the New Orleans National Banking Association.

The main relief sought is (folio 10) that the appellee Fry be directed to deliver to them the said bonds; and, second, that if it shall appear that Fry has any lien, he may set forth a full account of the same.

A decree was entered in the action on the 6th day of December, 1882 (page 73), adjudging that the defendant Fry had such lien, and directing him to account as to the amount of the same (as also for certain coupons of the

said bonds which he had collected) before a Master appointed by such decree.

Such accounting was had, and on the 5th day of March, 1884, a final decree was entered in said action adjudging the amount of such lien and directing that so much of the said 232 bonds as might be necessary to pay the same, to wit, the sum of $79,834.02, with interest on the whole amount of the lien, should be sold under the direction of a Master named in said decree. This decree appears at page 146.

The decree was at once carried into effect, and on the 5th day of April, 1884, 92 of such bonds were sold at prices ranging from 103 to 104 per bond.

The defendant Fry was paid the amount of his lien, a small balance of cash in the hands of the Master was turned over to the appellants, and the entire balance of the bonds, together with all accumulations of interest on coupons, uncollected coupons, judgments and claims of every nature bearing upon the bonds were forthwith turned over to said appellants in pursuance of said judgment. (See Master's Report of Sale, page 150 and copy Receipt of Appellants to Fry which we ask leave to submit on this argument.) This may be received under

Irving Bank *vs.* Adams, 28 Hun, 108.
Stillwell *vs.* Carpenter, 62 N. Y., 639.

The Master's report was filed on the 28th day of April, 1884.

At page 162 appears an order in the action confirming such report entered on the 11th day of February, 1885.

The petitions of appeal were not filed until the months of September and October, 1885.

It is supposed that these appeals will be prosecuted to urge a judgment decreeing that the complainants and the defendant Reynes were entitled to the bonds absolutely, and that the defendant Fry had no lien thereon, and that failing this, the Court will be asked to reduce the liens adjudged in favor of defendant Fry.

The liens that Fry claimed and established were two. The first, a banker's lien for balance of account due

Schuchardt & Sons by Cavaroc & Son; and second, a lien for an unsecured balance of account of the New Orleans National Banking Association of $100,000.

Various questions arose below, and will doubtless be discussed here, as to the extent and amount of such liens and the liability of Fry as to his custody of the bonds in suit.

The figures making up the accounts are not, to any considerable extent, a matter of dispute; and, indeed, the whole case turns very largely upon the construction to be given to correspondence and acts over which there is and can be no dispute.

While the parties give different versions of their understanding of some of the documents in evidence, there is little if any conflict of evidence which is material to the issues involved.

The different propositions that were raised below and that may be argued here are as follows:

1st. Had Schuchardt & Sons a banker's lien against these bonds for the indebtedness of Cavaroc & Son.

2d. Had Schuchardt & Sons a lien on these bonds for the indebtedness of the New Orleans National Banking Association to them.

3d. Could the appellee Fry credit the entire dividends received from the Receiver of the New Orleans National Banking Association on the unsecured part of its account with Schuchardt & Sons.

4th. Was he entitled to interest on the $100,000 secured by the pledge of these bonds from January 12th, 1874, the date when the account was closed and proved against the Receiver of such Banking Association?

5th. Did Fry owe any active duty to enforce the coupons on the bonds which the City of New Orleans refused to pay until requested so to do?

6th. Having, at the request of the appellees, caused suits to be instituted to collect such coupons, had he the right to be allowed his necessary counsel fees for the performance of such services?

7th. Was he entitled to be paid a reasonable allowance for a safe deposit vault in which to keep these bonds?

8th. Did he perform his duty in depositing the moneys collected on account of these coupons with a banking institution in the City of New York, and is he liable to account to the appellants for any further interest than he received from such banking institution?

9th. Can the appellants maintain these appeals, even if error be shown in any of the foregoing matters, because of want of jurisdiction in this Court, and the Court below to entertain the case for want of equity ?

There were other matters litigated below and held against the appellee, namely: He was compelled to pay full statutory interest on certain moneys, being the proceeds of coupons on these bonds collected by Schuchardt & Sons before their failure, and which he had always kept on deposit in a banking institution in the City of New York, to be disposed of in accordance with such judgment as might ultimately be rendered concerning these bonds.

He was likewise denied any commissions for the services he performed in collecting the coupons by suit in New Orleans, and he was denied all counsel fees for protecting himself against the claims made against him in the action from which these appeals are taken.

Schuchardt & Sons were bankers doing business in the City of New York.

Cavaroc & Son were bankers and merchants doing business in the City of New Orleans.

The New Orleans National Banking Association was a bank doing business in the City of New Orleans, and Charles Cavaroc, the senior member of the firm of Cavaroc & Son., was its president.

Dumont & Co. were apparently merchants doing business in France.

The National Banking Association of New Orleans failed on the 4th day of October, 1873, and a Receiver was duly appointed in accordance with the provisions of the United States Statute.

Cavaroc & Son failed on the 4th day of October, 1873, and the appellant here, Edward H. Reynes, was appointed one of their assignees.

Schuchardt & Sons failed in the Spring of 1876, and Charles M. Fry was appointed their trustee in bankruptcy.

Dumont & Co. do not appear to have failed, but they neglected to pay certain drafts drawn on them by Cavaroc & Son which form part of the claim on which a banker's lien was allowed in this action.

POINT I.

Had Schuchardt & Sons a banker's lien against these bonds for the indebtedness of Cavaroc & Son?

The consideration of this point necessitates an inquiry into the entire history of these bonds.

The senior Cavaroc testifies, folios 45 and 46, that the bonds were bought by his firm in partnership with F. Dumont & Co. That the purchase was on joint account. That they drew on Dumont & Co. for the payment of the bonds. And as such drafts matured, they were covered by remittances of exchange made by his firm and other drafts, and so continued until his failure, at which time 200,000 francs, representing a portion of the purchase price of such bonds, were in the hands of Schuchardt, for which Cavaroc & Son had been given credit, and which Schuchardt & Sons charged back against them on the refusal of Dumont & Co. to honor the same. (See entries in Exhibit B appearing at page 30 of the case.)

It appears, at the same folio, that these bonds were purchased in 1870, and the same year they were delivered by Cavaroc & Son to Schuchardt & Sons. (See the evidence of Cavaroc, Senior, folio 23, and the evidence of Cavaroc, Jr., folio 72.)

These bonds ever afterwards remained in the possession of Schuchardt & Sons.

At folio 94 is given a statement of the various loans made on said bonds through the agency of Schuchardt & Sons.

The amount originally delivered appears to be $275,000 instead of $232,000, the balance having been delivered up at some time to Cavaroc & Son.

The statement above referred to shows that on at least one occasion Schuchardt & Sons made a special loan of $100,000 on the security of these bonds.

Lawrence Wells, one of the members of the firm of

Schuchardt & Sons, when called by one of the appellants as a witness, testifies, at folio 77, that C. Cavaroc, Jr., in the Fall of 1870, delivered to him the bonds, stating that he wanted to use them as collateral to raise money, considering them a good security. That the only other occasion on which any other conversation was had concerning them was with Cavaroc, Jr., in the Fall of 1873; but the witness is unable to recall what was said. And he states distinctly, which is a fact that has never been questioned, that Schuchardt & Sons had no information from any source whatever that these bonds belonged to any one else than the Cavarocs.

They were negotiable bonds, and their possession by the Cavarocs was a sufficient indication of ownership to justify this belief.

The fact that Fry was able to collect the coupons by suits in his own name shows in itself that the bonds were coupon bonds.

Being negotiable bonds, the possession of Cavaroc & Sons was a full protection to any third party dealing with them, concerning such bonds on the faith of such possession, and without notice of any equities of any other persons therein.

Thompson *vs.* Lee Co., 3 Wall., 327.
Commissioners *vs.* Clark, 94 U. S., 286.
Murray *vs.* Lardner, 2 Wall., 111.

Aside from this rule of law the case nowhere discloses Dumont's interest in the bonds, excepting as stipulated in the decree, and the division so arranged may have been in no manner dependent on Dumont's original interest in the bonds, and at any rate the proofs quite clearly show that the bonds were purchased under a sort of copartnership arrangement between Cavaroc & Son and Dumont & Co., and were sent to New York to secure the money advanced for their purchase, and as above shown the maintenance of Schuchardt's banker's lien really results in paying the last renewal of drafts on which the moneys were obtained from Schuchardt & Sons to pay for these very bonds.

The nature of the business between these two firms was

the sale or negotiation of bills of exchange drawn by Cavaroc on France and England.

Schuchardt & Sons advanced on or endorsed and sold these bills and carried the proceeds to the credit of the Cavarocs.

They likewise negotiated loans for them with various institutions and firms.

Schuchardt & Sons rendered accounts monthly or quarterly to Cavaroc & Son, which contained a statement of all transactions between them, including the various loans negotiated for Cavaroc (see evidence of Wells, folio 80).

The witness then denies the statement of the Cavarocs that they had never authorized Schuchardt & Sons to borrow money on these bonds, or that they had been deposited with the firm of Schuchardt & Sons merely for the purposes of safe keeping.

And then the witness, at folio 81, expressly states that Schuchardt & Sons held these bonds as security for whatever Cavaroc might be indebted.

The witness likewise states the compensation which Schuchardt & Sons received out of these transactions, and that Schuchardt & Sons did not keep a safe deposit and were not warehouse men; that they kept these bonds with their own securities (folio 83).

Leupp, a witness for the appellee, testified that Cavaroc & Son conducted a merchandise as well as a banking business, and were large shippers of cotton, and against these shipments they drew bills of exchange which were sent to Schuchardt & Sons for negotiation and sale, Cavaroc & Son drawing their drafts on Schuchardt & Sons against the proceeds of such bills, and that Schuchardt & Sons honored their letters of credit and were their financial agents in New York City for money matters generally, and procured loans for them.

Folios 112 and 113, that Schuchardt & Sons had been bankers for a long time and did a banking business with Cavaroc & Son, having funds of Cavaroc & Son on deposit with them on which Cavaroc & Son drew checks at sight.

The balance was a fluctuating balance, and Cavaroc & Son at times overdrew their account and were in the habit, on

forwarding bills of exchange, of drawing against them without waiting to be advised of their realization.

This witness also testifies, at folio 158, that the rate of interest charged Cavaroc & Son when they were overdrawn was seven per cent., and when there was a credit balance they were allowed four per cent.

The claim made by the Cavarocs was that the bonds had been deposited for safe keeping, Cavaroc, Sr., testifying (fol. 42) that he could not remember the conversation at the time the bonds were deposited. That at that time he did not owe Schuchardt a cent, and trusted them simply with the bonds without any idea of borrowing on them.

And yet, in his answer to the tenth direct interrogatory at folio 45, he claims that there was no balance due on his general account with Schuchardt & Sons at the time of his failure, because, he says, they had omitted to credit his firm with interest coupons on the bonds in suit which fell due December 1st, 1873.

The younger Cavaroc, in answer to the last general interrogatory, gives his version of the deposit of these bonds, saying that the bonds were purchased from the proceeds of bills of exchange sold on F. Dumont by his firm in December, 1870.

Owing to the Franco-Prussian war, in the Fall of that year, the firm of C. Cavaroc & Son sent these bonds to New York by express, and he went to New York for the purpose of securing a loan, which he did through Schuchardt & Sons.

That he sent the money to England to enable Dumont to protect the drafts.

That in the Spring of 1871, when the passions of war were cooled, the firm of Cavaroc & Son drew again on Dumont, paid the said loan to Schuchardt, and then the bonds were released.

That as the express charges were very heavy to bring on the bonds to New Orleans, and as New York was a better market when he wanted to dispose of the bonds, he then asked Schuchart & Sons the privilege of leaving them for safe keeping.

That from time to time they had the coupons detached, once by one of their own clerks, once he did it himself, and

on other occasions by Schuchardt & Sons, who would collect the same and place to the credit of Cavaroc & Son on their books.

That the bonds always remained for safe keeping with Schuchardt & Sons, and no conversation of any form ever took place between him and Wells concerning them.

And he then adds, by way of argument, that he could never have discussed the possibility of pledging these bonds in the Summer of 1873, for the reason that they were not their property, and that the proof of it lay in the fact that they had left them from the Spring of 1871 without ever touching or using them, when they had seen days when they had to use all their securities.

It will be perceived that these two gentlemen, in this attempted avoidance of the liability claimed against their bonds, differ, Cavaroc, Sr., testifying distinctly that in the first instance the bonds were deposited for safe keeping without any idea of borrowing money, and the younger Cavaroc saying that he had them sent to New York, in the first instance, for the very purpose of borrowing money to remit to Dumont to take up the drafts which had been drawn for the purchase price of these bonds.

Considering also that the older Cavaroc admits that the drafts drawn for the purchase of these bonds were never paid in full, but, on the contrary, from time to time renewed, and that almost the last item in the account between his firm and Schuchardt & Sons was of 200,000 francs of such very drafts, and considering also the evidence of Mr. Wells is not impeached as to the various occasions when loans were made upon these bonds, Cavaroc, Jr.'s argument that he could never have discussed the possibility of pledging them as they had left them so long untouched, not only loses its force, but indicates a poor endeavor to bolster up a pretended agreement in the way of a deposit of these bonds to take them out of the general rule of law justifying a banker's lien.

Certainly Cavaroc & Son did not hesitate, in February, 1873, to pledge these bonds as security in some form or another for advances to be made to the New Orleans National Bank, as appears by Cavaroc, Sr.'s, letter of February

15th, to which the attention of the Court will be directed in the consideration of the next point.

To the fourth interrogatory propounded on behalf of the appellant Reynes (fol. 49), Cavaroc, Sr., repeats that Dumont & Co. and Cavaroc & Son were equal owners of the bonds, and that 200,000 francs of drafts, which appear in the final account between Schuchardt & Sons and his firm, were drawn against those very same bonds, and his only answer there to the claim of Schuchardt & Sons to hold fifty of his bonds to secure the indebtedness of his firm is that their account was not correct, because, according to the facts stated by them in previous interrogatories, his firm owed nothing to Schuchardt & Sons.

He reiterates his statement as to these 200,000 francs at fol. 50.

It will be noticed that the appellee's witnesses nowhere claim that there was any specific arrangement made concerning these bonds, so far as the claim for banker's lien is concerned.

They do aver their understanding that they were with them as security for all moneys that they should advance, Wells stating distinctly that they were delivered under a statement by Cavaroc, Jr., that he wanted to use them as collateral to raise money.

This certainly was the fact according to Cavaroc's own admission.

The business transactions between the parties were large; the bonds were constantly being pledged for loans; Schuchardt & Sons were collecting the coupons and crediting them in their account with Cavaroc. The business was between two banking houses, and the rule of law, as we understand it, being that a banker is entitled to a lien on any securities entrusted to him, in the absence of a special understanding to the contrary, for a balance of account due him from the party delivering the securities, it would seem that the Court below was correct in holding that the appellee Fry, as trustee of Schuchardt & Sons, was entitled to maintain a banker's lien against these bonds for the balance due on the account between Schuchardt & Sons and Cavaroc & Son.

It is respectfully submitted that it was not essential for the Schuchardts to prove affirmatively a deposit of these bonds as security for such account.

It was enough that they were lawfully in their possession to establish their banker's lien; and it is respectfully submitted that the Cavarocs have wholly failed to show any agreement to the contrary.

The only other evidence in the case bearing upon this matter is that of the appellant Reynes, at page 19, and that of Mr. Le Breton, at page 20.

Their evidence is largely hearsay. Both admit that all they know about the deposit is from Charles Cavaroc, and do not claim to know why they were deposited.

Le Breton says, that from Cavaroc's statement, the bonds were deposited with Schuchardt in 1873.

In this he is clearly in error.

He then avers of his personal knowledge as to their cost, and agrees with Cavaroc that they were paid for by a series of drafts, some of which were outstanding at the time of his failure.

The letter of Schuchardt's of October 9th, appearing at page 31, has no significance.

On the bonds being demanded they apparently base their refusal on the ground of the pledge with the New Orleans National Banking Association.

But the concluding phrase in the letter asking about bill of lading to Queenstown may well refer to their account with Cavaroc & Son, and beside the considerable balance claimed on that account was not then arrived at, nor were they called upon in that letter to state other than the most important claim upon which they held the bonds.

Cavaroc's admission that they claimed to hold 50 of these bonds for his balance of account shows that at or about the same time they must have asserted to him this claim, and the account in evidence at page 30 is produced by Cavaroc. It is headed "Messrs. C. Cavaroc & Son in account with Messrs. Schuchardt & Sons." It shows a balance of $7,454.22 as of the 12th day of January, 1874.

Cavaroc does not pretend to deny its correctness. He simply says that if Schuchardt & Sons had credited him

with coupons on the bonds in question due December 1st, 1873, the balance would have been destroyed (see fol. 45).

The account filed by Mr. Fry in obedience to the decree entered herein accounted for such coupons, and by the final judgment entered herein he was charged with interest on the proceeds at the full statutory rates from the time Schuchardt & Sons received the money, and therefore, as a matter of fact, Cavaroc obtained the very credit that he claimed.

When Fry accounted in this action, all matters were brought down to the 19th day of December, 1882.

The balance due on this account is swelled from $7,454.22 to the amount adjudged in the decree of March 5th, 1884, $25,715.22, by the addition of interest and a charge for the amount paid and expenses incurred in defending a suit brought on a draft for $20,000 drawn by Cavaroc & Son upon Schuchardt & Sons bearing date the 1st day of October, 1873. This draft is set forth at folio 204.

The details of the account in question appear at folio 138.

The witness Leupp, at folio 153, testifies that he has made up a statement of the account of Cavaroc & Son with F. Schuchardt & Sons. And the account is offered in evidence and appears at page 105 of the case, which agrees, dollar for dollar, with the account just referred to and with the amount found due.

The accuracy of this account was not questioned below.

No examination was made of the witness as to its details by either side, and at no time was it questioned that $9,500 was paid in settlement of the suit on this draft.

While the evidence might have been more complete as to the payment of this sum in settlement of that suit and the small amount charged for costs and counsel fees in defending it, we assume that no objection having been made as to the sufficiency of the proof in the court below, no such objection will be entertained here, and that the entire amount of the lien, as proved by the witness Leupp, will be allowed or disallowed as the Court may agree or differ with us as to Mr. Fry's right to maintain a banker's lien

But the record at page 57 removes all questions on this

point, as the same witness there testifies that after the account current with the firm of Cavaroc & Co. was rendered to them, the amount of the balance due from them was increased by the following transaction:

About the date of the failure, Schuchardt & Sons telegraphed to Cavaroc & Son that owing to the panic then existing, to limit exchange operations as much as possible and not to draw against exchange sent except upon telegraphic authority from Schuchardt to do so.

$30,000 were drawn and not honored by Schuchardt. Suits followed.

A claim on one draft of $10,000 was defeated, and judgment rendered upon the $20,000 draft.

This judgment was settled for $9,500, which increased Cavaroc's debit balance to $17,305.73.

The following authorities we respectfully submit sustain our contention for a banker's lien upon the foregoing evidence:

Bank of Metropolis *vs.* N. E. Bank, 1 How., 239.
Falkland *vs.* St. Nicholas B'k, 84 N. Y., 149.
Bryce *vs.* Brooks, 26 Wend., 372.
Knapp *vs.* Alvord, 10 Paige, 205.
Myer *vs.* Jacobs, 1 Daly (N. Y.), 33.
Nagle *vs.* McFeeters, 97 N. Y., 202.
2 Kent Comm., Vol. 2, p. 641, margin. 12th Edition.

POINT II.

Had Schuchardt & Sons a lien on these bonds for the indebtedness of the New Orleans National Banking Association to them?

This question will be determined entirely upon the correspondence of the parties and the knowledge of the business transacted between the New Orleans National Banking

Association and Schuchardt & Sons to be gleaned from the evidence in the case, the Court being at liberty to consider the situation and acts of the parties and the surrounding circumstances as a guide in determining the real meaning of the pledge.

Bell *vs.* Bruen, 1 Howard, 186.
French *vs.* Carhart, 1 N. Y., 96.
Waldron *vs.* Willard, 17 N. Y., 467.
White's Bank *vs.* Myles, 73 N. Y., 335.
Coleman *vs.* Beach, 97 N. Y., 553.
Barney *vs.* Worthington, 37 N. Y., 115.

The pledge in question was made in French. We here insert it as it appears at folio 108.

"NEW ORLEANS, the 15 Fevrier, 1873.

"Messieurs F. SCHUCHARDT & SONS, New York.

"MESSIEURS & AMIS:

"Dans votre lettre du 11 ct., vous dites: The credit of $100 M à découvert was predicated upon the deposit of New Orleans City bonds, and on their withdrawal we, of course, supposed the agreement cancelled.

Vous savez que le change a New Orleans est ascheté en faisant de avances jusque á ce que les traites soient livrées & c'est afin d'activer nos rapports que nous vous avions demandé il n'y a rien è l'epoque, ce découvert.

Devant votre observation, à dire si ce n'est de vous autoriser à considérer comme sécuritè collatérale une partie des "bonds" que vous avez à ma maison, en cas de découvert.

"Votre dévoué

"C. CAVAROC."

Our translation of the same, which is the only sworn translation in the case, appears at folio 109.

The difference between the parties arises on the interpretation to be given to the expression "*en cas de découvert.*"

Very different interpretations as to the meaning of this expression are given by the respective parties.

The interpretation claimed by the appellants makes the pledge a valueless piece of paper.

The interpretation claimed by the appellee gives force and effect to the pledge, and holds the bonds to make good the loss on the account of the New Orleans National Banking Association with Schuchardt & Sons to the extent of $100,000.

The testimony of Cavaroc is a cunningly contrived attempt to evade the responsibility intended to be assumed.

The transactions between the New Orleans National Banking Association and Schuchardt & Sons were of great magnitude, being for millions of dollars at a time—sometimes over a million in one day (see folio 83).

Out of the transactions Schuchardt & Sons made a commission of only from one-quarter to one-half per cent. (folio 83).

Schuchardt & Sons were in the habit of rendering an account current to the New Orleans National Banking Association monthly.

The account had certainly been running for two years, as the first of the letters in evidence was written on the 4th day of December, 1871 (see folio 61).

The last monthly account contained debit items to the extent of $688,459.13.

The account consisted in part of remittances of paper from the bank to Schuchardt & Sons, which were credited on their receipt in New York (folio 99), and were so credited at once without waiting for their realization. And when any paper so credited was returned protested, it was charged back to the same account as originally credited, up to which time the matter was open.

And to the knowledge of the witness Leupp so testifying, who had been a clerk for twelve years and cashier in 1873 and 1874 for Schuchardt & Sons, that firm never took or assumed to take such paper as a payment by the bank, nor was there any such custom known to New York bankers (folios 99 and 100).

The correspondence also shows quite plainly that to a great extent the nature of the business between these two parties was the remittance of bills of third parties by the

New Orleans Bank to Schuchardt & Sons, and at times the bank drew in advance of such remittances.

In other words, the account will be found, on careful examination of the evidence and correspondence, to have consisted of the New Orleans National Banking Association using Schuchardt & Sons as a means of raising money in the City of New York.

It purchased and sent them exchange, and it also sent its own drafts on foreign houses, for all of which the bank received credit on the receipt of the same by Schuchardt & Sons.

The last account between these parties was for the month of September, and showed a balance against the bank of $4,121.92.

The witness Leupp further testifies, at folio 100, page 57, that some of the credits contained in that account of October 1st, were returned unpaid. And he there gives the details of the return of a large amount of protested drafts, which increased the balance on the currency account to about $190,000.

The Gold account between the same parties, which was made up for three months from the first of July to the 1st of October, showed a balance against the bank of $68,231.-17, which was afterwads reduced to $14,691.05.

This Gold account, the witness testifies, was also a portion of their exchange operations, but other matters were also contained in that account.

The amount of the claim of Schuchardt & Sons against the New Orleans National Banking Association was finally allowed by its Receiver at $195,315.63.

A schedule of the items forming the Gold account was called for and annexed to the deposition, but does not seem to be printed in the record.

Now, Charles Cavaroc, Sr., was the president of the New Orleans National Banking Association, and it may be supposed had the general interest in it that the president of any large financial institution is assumed to have, and also full knowledge of its business and circumstances.

We have no evidence in the case as to the time of the commencement of the account between these two parties,

or as to the security that Schuchardt & Sons had for advancing to the bank on its remittances.

But it is quite plain that in December, 1871, Schuchardt & Sons desired and had received some security from the bank.

The letters in question, which appear at pages 28, 29, 30 and 31 of the Record, and again at pages 34, 35 and 36 of the Record, were all offered by the appellants.

The first is a letter from Schuchardt & Sons in December, 1871, which is printed in part at page 28 and in full at page 33.

The letter is evidently written in response to an inquiry from the New Orleans National Banking Association as to being allowed to draw in advance against purchases of exchange.

Schuchardt & Sons say that they granted that facility at a time when the foreign exchange business of the bank with them was much more extensive, and consequently more remunerative, and when they held as security a deposit of New Orleans City Bonds.

There is no evidence of any other New Orleans City bonds in the case having ever been placed in the hands of Schuchardt & Sons than those delivered to them by the Cavarocs ; and yet the evidence likewise shows that those bonds had only been delivered a year prior to the writing of this letter.

It would perhaps be about an even thing to assume that the reference was to these very bonds. But the concluding paragraph of the letter would indicate that such bonds were then in New York, for the Schuchardts say : "We presume also that when the loan of the trust company, which falls due on the 21st inst., will be paid, the securities will be replaced in our possession."

This pretty plainly referred to the bonds of Cavaroc, and we think it may be fairly assumed that at even this date Cavaroc had in some manner pledged these bonds for this account.

And this is in accordance with the evidence of Wells, who testifies, at page 53, that he understood that Cavaroc deposited these bonds with his firm as collateral in relation

to their transactions with the New Orleans National Bank; that he considered it as held for any balances that the bank might owe them.

It is true that the questions to which these answers were given were leading, and that they may be referred entirely to the pledge given in 1873.

And in answer to cross-question, at folio 97, page 54, this occurs:

"Q. What, if any, authority had you for holding these bonds and coupon money as collateral for the indebtedness of the New Orleans Banking Association other than the letter Exhibit 2 of defendant Fry? A. A general understanding to that effect arrived at in conversations with C. Cavaroc, Jr.

x Q. 25. When? A. At different times when he was in New York; among others, in August or September, 1873.

x Q. 26. What is your best recollection of that general understanding then made? A. My understanding then was that bonds were to be left with us against any indebtedness of the bank, and I would not have delivered them while the account was running."

And he then states, at page 55, that he knows of no other written authority to hold those bonds than the pledge which is now in question.

We think, therefore, it may be fairly inferred that this letter of 1871 referred to these bonds.

And further, in that letter the distinct statement is made that Schuchardt & Sons were induced to make these advancements on the assurance of Cavaroc that the bank would only temporarily require such facilities.

And they say:

"However, in order to evince our desire of doing all in our power to contribute to the development of our correspondence, we hereby authorize you to draw upon us in advance of remittances to the extent of $100,000, *with the understanding that such drafts are to represent exchange bought and paid for.*"

There is no other correspondence between the parties until February, 1873.

Whether Schuchardt & Sons had or had not any pledge that they could have enforced against these bonds on account of the New Orleans National Banking Association in 1871 is immaterial to the decision of this question, except so far as it enables the Court to ascertain the general use made of these bonds.

If there had been such a pledge, the correspondence of February, 1873, clearly shows that it had been in some manner withdrawn. There is nothing in the case to show how it was withdrawn, and nothing certainly in the case prior to that month to show that there had been ever any pledge made of these bonds which could be enforced against this indebtedness.

Nothing further appears in the record until a communication from the cashier of the Banking Association, dated February 6th, 1873, appearing at page 34. It is addressed to Schuchardt & Sons and asks: "Are we still authorized to draw *a découvert* against purchases of exchange. Advise by wire."

To this Schuchardt & Sons reply on the 11th: "The credit of $100,000 *a découvert* was predicated upon the deposit of New Orleans City bonds, and on their withdrawal we of course supposed the agreement cancelled."

The evidence as to the pledging of these bonds for loans, at folio 94, would indicate that they were unpledged at that time.

Probably the fair assumption is that in some manner Cavaroc had notified the Schuchardts that these bonds must not be held as security for the New Orleans account.

The Banking Association, under date of February 15th, reply to this rather claiming that they had supposed the credit to be still in force, but noting that it is cancelled, and refer Schuchardt & Sons to the private letter of their president on the subject.

Cavaroc does not attach the original of this letter, but his translation of it (see bottom of page 29).

The translation is not complained of, except as to the concluding words; and as he also adds the French expression used, we may treat the letter as a pledge of these bonds for account of the New Orleans National Banking Association, which we claim was to the extent of $100,000 for the unpaid balance of account, and which the appellants claim was only to the effect of a guarantee that remittances should be made, whether good, bad or indifferent.

The reply of the Schuchardts to this letter is dated February 27th, and shows distinctly their interpretation of it.

It is, that in reply to the above letter they take pleasure in authorizing the Banking Association, in accordance with the terms therein stated, to value on them *a découvert* for a sum not exceeding as maximum $100,000 AGAINST *exchange purchases.*

Now, this pledge, whatever its effect, is nowhere denied, nor is the fact denied that when the New Orleans National Banking Association failed it had in the hands of Schuchardt & Sons its own drafts on foreign houses to an extent far in excess of $100,000, for which it had received credit in its account with Schuchardt & Sons, for which it had received the money, and all of which drafts came back protested and unpaid, and Schuchardt & Sons were obliged to meet them.

To the extent of $100,000 unpaid balance of such amounts, Mr. Fry claimed and sustained a lien on these bonds.

It would seem to be the fair and ordinary interpretation of this correspondence that it was intended to accomplish this, and was intended to secure Schuchardt & Sons to the extent of $100,000 in their dealings with the Banking Association.

But Cavaroc says, not so.

"The words *a découvert* are used more frequently in French than credit. If I write in French to ask an open credit to a banker I will merely ask him, 'Let me draw on you *a découvert* for one or two hundred thousand dollars.' If I say to the banker, 'I will cover you with exchange to that amount, as soon as I cover with that amount, it is finished. I do not owe a cent to that amount; *a découvert* is closed and I have a right to go on again. It is a revolving credit.

For instance with Schuchardt. Suppose I draw to-day $100,000, and it is *a découvert*, and the next morning or day after I send to Schuchardt $100,000 of exchange bought from different houses here; my *a découvert* is finished. It is closed as soon as I have remitted exchange for the $100,000 draft of the day preceding. Schuchardt is covered then.

On the same day or next morning I have a right to draw $100,000 and draw again. As soon as I have remitted $100,000 exchange, I have a right to draw again.

Therefore, when the bank remitted exchange to cover what the bank had drawn under that credit *a découvert*, the guarantee made by me ceased and the right to hold these bonds ceased under that guarantee."

He then proceeds in his ninth interrogatory to say:

"The bank did owe Schuchardt & Sons a few thousand dollars according to their account current on the 1st of October, but as the bank only failed on

the 4th of October and had remitted during those three days, I have no doubt that the balance was a trifling one and may be against Schuchardt & Sons. The bank might have become subsequently liable on drafts or endorser of exchange which was afterwards protested.

I am positive, though, that the credit *a découvert* for the $100,000 was covered entirely by the remittance of drafts.

There had been an account, but that account of *a découvert* at that time was closed. It existed no more because there was no indebtedness under it. I know nothing about debts opened since."

We believe that this defense is rested entirely upon the evidence of this witness.

But it will be noticed that it is based upon an assumption that might have been, and would naturally be, ruinous to any firm of bankers entering into it.

The correspondence shows, and the fact may be admitted, that the bank was frequently in the habit of advancing money on the purchase of exchange before it actually received the bills.

Schuchardt & Sons seem to have been careful to have limited this right to draw in advance to the drawing of drafts representing exchange bought and paid for (see this expression in their letter of December, 1871, at folio 62).

Their reply to the bank of February 27th is again exceedingly cautious, concluding with the words "for a sum not exceeding as a maximum $100,000 against *exchange purchases.*"

And the letter of Mr. Wells, a member of the firm of Schuchardt & Sons, of September 19th, 1873, appearing at folio 64, page 35 of the case, is distinct.

This letter is written to Mr. Cavaroc, and says:

"I have sufficiently explained to you on your last visit here that we should prefer receiving from the bank only such paper as it should have purchased; and after mature consideration and consultation with Mr. Schuchardt, we have determined to request the bank to limit its exchange business with us to the forwarding of such drafts made by third parties as it shall deem proper to purchase, and we beg you so to inform the bank.

We hope that the bank shall give great activity to its operations on the above basis, and in order to assist it as much as possible, we still authorize it to draw against the *purchase of exchange* and in advance of the remittances to the amount of $100,000, on the conditions specified in the letter of Mr. Cavaroc of 15th February last."

Taking this correspondence as its basis, Cavaroc claims that the bank was authorized to draw on Schuchardt for

$100,000 on the pledge of these bonds, and that the bonds were only collateral to the bank remitting to Schuchardt the exchange of third parties purchased with the moneys so drawn, and that the moment such remittances of exchange reached Schuchardt's hands the credit was closed and a new one opened.

Now, had the bank been engaged in the actual purchase of the exchange of third parties, there would have been more reason for the argument which has been contended for, and which Cavaroc so plausibly urges; but as a matter of fact, no remittances of the kind called for had been made or were included in the drafts which went to protest and raised the debit of the New Orleans National Banking Association from $4,000 to $195,000.

Wells' expression in his letter, that they had concluded to limit the exchange business with the Bank to the forwarding of such drafts made by third parties as it should be deemed proper to purchase, is significant.

Now, Cavaroc says, at folio 45, that he is positive that the credit for the $100,000 was covered by the remittance of drafts.

Does the account show this?

At page 57 will be found a list of the drafts which made this large debit balance.

One is on Honorat, of Marseilles, for thirty-three thousand eight hundred and odd dollars; another of Seignouret, Freres & Co., of Bordeaux, for fifty-six thousand four hundred and odd dollars; others on A. Dutfoy & Co., of Paris, for ninety thousand and odd dollars; another, an unpaid acceptance of a New York house, twelve thousand five hundred dollars; and last, a small draft on a New York Bank for three hundred and fifty-three dollars.

And at page 59, in answer to a question by the appellant's counsel, the witness says: "*The drafts on Dutfoy, Seignouret and Honorat were foreign exchange bills known as clean, that is, unaccompanied by documents drawn by the New Orleans Banking Association on those parties.*"

The one on the National Park Bank was drawn by the

New Orleans National Banking Association to settle a collection made.

Now, these drafts were not the exchange of third parties, bought in the market and remitted to Schuchardt.

The fact is, as explained by Cavaroc in the first part of the eighth interrogatory: "The words *a découvert* are used more frequently in French than credit."

The fair meaning to be given to the word is doubtless the opening of credit. If Schuchardt & Sons chose to take the chance of going beyond it, they did it on their own responsibility. But for their balance of account to the extent of $100,000 they had opened a credit for the New Orleans National Banking Association which that Bank could avail of by drawing direct on Schuchardt or by drawing on foreign houses and getting such drafts cashed.

No other understanding could possibly have been given to the correspondence by Schuchardt & Sons, or they certainly would not have received and paid the full face value of drafts aggregating nearly $200,000 drawn by this bank on foreign houses.

And doubtless it will be held here, as was in the court below, that the fair interpretation of this pledge was that the bonds stood as collateral to any credit, any *a découvert*, that the Bank asked and received from Schuchardt & Sons.

In ascertaining the meaning of language used the same rules of construction are applicable to contents of suretyship as to other contracts.

Hamilton *vs.* Van Rensselaer, 43 N. Y., 244, 245.

Even, therefore, if Mr. Cavaroc had been correct in the narrow meaning he wishes to give the words "*a découvert*," it is plain that we fall within the protection of his pledge, for the reason that no exchange ever was remitted to remove the pledge of these bonds to protect these drafts of the Bank. In other words the bills set forth in detail by Leupp were the original drafts issued by the Bank. The Bank was bound to purchase and remit exchange purchased with their proceeds. The bonds according to Cavaroc were pledged to secure such purchase and remittance of exchange. It was never remitted and therefore

Schuchardt's loan on the bonds was good even on Cavaroc's interpretation.

Much weight may at this point be given to the consideration of a paper offered in evidence by the appellants, appearing at folio 110, page 63, of the case.

This seems to have been a sort of a memorandum made by Mr. Wells at the time of the visit of young Cavaroc in the Fall of 1873 to New York.

This expression is used: "When the Bank sends the drafts of the bank on third parties, Havre, Bordeaux, Marseilles, etc., it must put in the hands of Messrs. C. C. & Son in trust a deposit of securities, there to remain until the acceptance or *the payment, if we deem proper to await the payment.*"

This memorandum was introduced with the idea that it tended to break down the appellee's case. But when examined in view of the claim made by the appellants, how clearly it shows the real relations between the Cavarocs and the New Orleans National Banking Association and the Schuchardts.

Strangely enough the reference to drafts drawn by the Bank on third parties, Havre, Bordeaux and Marseilles, fits exactly to the drafts in question as they appear at folio 100 of the case, with the exception of the drafts on Dutfoy of Paris.

And plainly that letter shows that the Cavarocs knew that the Bank was drawing directly on third parties in Europe, and Cavaroc & Son undertook to protect themselves in the pledge of their bonds by exacting in trust a deposit of securities, to remain when? Until Schuchardt & Sons had received these drafts? Not at all. But until they were accepted by the parties on whom they were drawn, and if Schuchardt & Sons so preferred, until they *were paid, if they desire to await payment.* So that Cavaroc had full knowledge that Schuchardt & Sons, relying on the faith of this letter of credit, were advancing to the bank, not alone on its drafts on Schuchardt & Sons, but on its drafts on third parties in Europe, on the faith of the pledge of his bonds.

And he, as president of the bank and familiar with all

its operations, appears in a very doubtful light long after the loss had come, in averring that remittances had been made of exchange of third parties to lift the pledge of his bonds, when no man knew better than he that the loss had come because of his failure to exact the securities which he should have done, or because of his otherwise disposing of them.

And yet Cavaroc was not wanting in wisdom. In the very midst of these transactions, at a meeting of his Board of Directors, a resolution was passed, which appears at folios 30 and 88 of the case.

Cavaroc himself admits, at folio 46, that in the month of September he took great interest in the affairs of the Bank, aided it with his own funds and resources obtained from his friends. That he put in the Bank from $200,000 to $300,000 of good assets. That he had to help the bank.

That he presided at a certain meeting referred to in the interrogatory addressed to him at which the resolution set forth in such interrogatory was passed, and so far as he can remember, it was substantially the resolution passed at that meeting. That he did not vote for it because he was president.

Charles De Ruyter testifies, at folio 86, that he was one of the directors of that bank. That he kept the record of its meetings; and that the resolution agrees with his memory of the resolution passed at that date.

And now, what is this resolution? The president, this very Cavaroc, stated that the object of the meeting, which was held on the 20th day of September, 1873, was to inform the board of the unpleasant state of affairs in general, and particularly the panic then prevailing in New York. That the suspension of J. Cooke & Co., which was already announced, and which no doubt would be followed by many others, would tend to increase the present uneasiness and render the money market still more stringent.

He would therefore ask the board to suggest or adopt such measures as in their judgment they would deem expedient to avert the impending crisis.

And to avert this impending crisis, what was done? Merely

"Resolved, in view of securing the president against any eventual loss of the

seven per cent. City of New Orleans bonds, belonging to the firm of C. Cavaroc & Son, and actually pledged to Messrs F. Schuchardt & Sons, agents of the Bank of New York, as collateral security *for the payment of all foreign exchange bills intrusted to* their care for negotiation, *and by them endorsed*, that he be and is hereby authorized to select, as guarantee, from the portfolio of the bank such papers as he may think proper, to the extent of $100,000."

Could anything be more clear as to this witness's real understanding and knowledge of the pledge he had made?

He calls his directors together and states an unpleasant condition of affairs in the City of New York, asks them to suggest or adopt some measure to avert the impending crisis, and merely gets them to adopt a resolution that he may take securities from the bank to guarantee himself against the pledge that he had made of his own bonds.

And he there states that pledge exactly as we claim it, to wit, that his bonds were in Schuchardt's hands, actually pledged as collateral security for the payment of all foreign bills intrusted to their care for negotiation and by them endorsed. And thus, if the language of the guarantee is to be construed to effectuate the intention of the guarantor, 107 N. Y., 562, it follows that he meant to pledge these bonds as collateral for the payment of all bills sent by the bank to Schuchardt & Son and negotiated by them.

If he was taking the securities of the bank to guarantee himself, could this refer to any other than the bank's business and to the pledge of his bonds for their account in the very manner claimed by Mr. Fry? And this interpretation of Cavaroc of his own pledge brings us within the principle of still another rule, that where, in the performance of a written contract, both parties put a practical construction upon it, which is at variance with its literal meaning, that construction will prevail over the language of the contract.

District of Columbia *vs.* Gallaher, 124 U. S., 505.

Taken, therefore, in view of the surrounding circumstances of the case, the course of business, the declaration of the witnesses, the risk assumed by Schuchardt & Sons, we submit that justice requires that the version given by Schuchardt & Sons of the pledge should be assumed to be the correct one, and not the technical and narrow version claimed by Mr. Cavaroc.

And even if his technical meaning could be assumed to be correct, does it not necessarily follow that the bank had wholly failed to cover Schuchardt, by failing to remit the bills that were or should have been purchased with the proceeds of the bills on foreign houses, set forth at length by Leupp, and which Schuchardt & Sons cashed on the pledge of these bonds.

In other words, even on Cavaroc's claim, the matter comes down to this: The bank, instead of drawing on Schuchardt & Sons directly and then remitting the exchange purchased with the proceeds of such drafts, chose, as a matter of convenience, to draw on foreign houses, getting them cashed by Schuchardt & Sons, and were under just as much obligation to remit the exchange which they purchased or should have purchased with the proceeds of such drafts as had such drafts been drawn on Schuchardt & Sons.

The argument thus far upon this point has been based entirely upon the form of the documentary evidence and the allegations of Mr. Cavaroc.

The understanding that Schuchardt & Sons had is by no means cloudy.

Wells, at page 53, after swearing to an interpretation of a letter which is in accord with his views, states distinctly that he understood that these bonds were as collateral to the indebtedness of the bank to his firm for any balance that the bank might owe. And he says that one of the interpretations to be found at page 158 of Spear's dictionary for the words "*á découvert*" is overdrawn.

Leupp is also plain. He had never heard of any such custom among bankers as to consider papers when received as payment without reference to the future fate of such papers.

And Casey, who was called as a witness by the appellants, sustains Mr. Leupp entirely in his evidence that the drafts which created the indebtedness of the New Orleans Banking Association were drafts drawn by that bank on Dufoy, Seignouret and Honorat, and he admits that the substantial part of Schuchardt's claim is made up by reason of such drafts.

The only further principle of law that seems material for

us to invoke in the discussion of this pledge is that the pledge, being in the handwriting of Cavaroc, drawn by him and sent by him to Schuchardt & Sons, is to be construed most strongly against him, if there be any serious doubt as to its interpretation

The words of a guarantee are to be taken as strongly against the guarantor as the sense will admit.

Fell on Guaranty, 131.
Douglas *vs.* Reynolds, 7 Peters, 122.
Lanusse *vs.* Barker, 3 Wheaton, 148 (note).

And it does not lie in the mouth of the guarantor to say that he may without peril scatter ambiguous words by which the other party is misled to his injury.

Lawrence *vs.* McCalmont, 2 How., 426.

If the guaranty admit of two constructions fairly, and the guarantee has advanced money upon the faith of that most favorable to his rights, that interpretation will prevail in his favor.

Lee *vs.* Dick, 10 Pet., 482.
Mauran *vs.* Bullus, 16 Pet., 528.

The contract was prepared by the Banking Association, and the appellants claim it is ambiguous; and the rule is that ambiguities in a written contract should be construed against the writer. To this effect see

Noonan *vs.* Bradley, 9 Wall., 394,

where the Court says, at page 407:

"If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that the party who takes an agreement prepared by another, and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him."

See also on this point:

Hooper *vs.* Wells, Fargo & Co., 27 Cal., 11.
St. Louis, &c., R.R. Co. *vs.* Smuck, 49 Ind., 302.
Menzell *vs.* R.R. Co., 1 Dill., 531.
Edsall *vs.* Camden, &c., R.R. Co., 50 N. Y., 661.

Broom, in his "Legal Maxims," p. 596 (7th Amer. Edit.), on this point says:

> "In like manner with respect to contracts not under seal, the generally received doctrine of law undoubtedly is that the party who *makes* any instrument should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention that he should be bound; and, on the other hand, that the party who receives the instrument and parts with his goods on the faith of it, should rather have a construction put upon it in his favor, *because the words of the* instrument are not his, *but those of the other party.*"

If, therefore, bankers doing business in the City of New York could reasonably conclude that the expression used by Mr. Cavaroc justified their belief that the bonds were deposited as security for the unsecured balance of account of the New Orleans Banking Association, Mr. Cavaroc's contrary understanding should not be permitted to prevail.

The learned Judge before whom this case was tried adopted these views and rendered his judgment accordingly, when for the first time was raised the consideration of the question now stated in

POINT III.

Could the appellee Fry credit the entire dividends received from the Receiver of the New Orleans National Banking Association on the unsecured part of its account with Schuchardt & Sons?

This question will be determined upon the form of the guarantee.

We submit that the bonds were pledged to secure to the extent of $100,000 any advances to the New Orleans National Banking Association that were unsecured or uncovered and remained unpaid.

The bonds were pledged for any balance remaining uncovered or unsecured after the application of all moneys col-

lectable on the drafts of the bank which Schuchardt & Sons cashed or for which they gave credit in account.

There was no guarantee of a specific debt.

There was no guaranty of a debt not exceeding a specific amount. The guaranty was for the unsecured or uncovered part of the account.

Cavaroc's own interpretation of the word *découvert* is "not covered."

His pledge is of all his bonds in case Schuchardt is not covered.

The limitation to $100,000 is only gained from the interpretation to be placed on the entire correspondence.

Cavaroc's own story is plain that these bonds were continually to stand for the uncovered balance of drafts.

We differ with him only in his claim that such covering was complete on the mere remittance of worthless bills, and have shown that even this formula was not complied with.

He claims that while the bonds would stand as security for $100,000 of drafts to-day, when this $100,000 was secured by proper remittances, his bonds would stand as security for the next $100,000 the bank should draw, and which should not be secured and so on indefinitely—the bonds always standing for the unsecured or uncovered drafts.

Therefore when the failure came, the intent of the pledge was that the Schuchardts should hold their bonds for the last $100,000 unsecured and avail of the securities in hand to pay off everything else.

In other words, they always held these bonds to meet overdrafts on them by the bank and which they could not otherwise collect, and they took their chances on all the other assets they had in hand, including any dividends they might get out of the general assets of the bank if it failed being sufficient to meet the rest of their advances.

If the pledge of the bonds was therefore the unsecured part of the drafts of the bank, then under the authorities, it is respectfully submitted, Schuchardt & Sons could apply all the available assets pertaining to such accounts, including claims for dividends against the estate of the bankrupt

bank on that part of their account not covered by the pledge of the bonds in suit.

Had the guarantee been merely to secure $100,000 of any overdraft of the bank, or overdrafts of the bank to the extent of $100,000, a different question might have arisen.

Mr. Fry's claim has, at all times, been in accordance with Wells' translation of the letter creating the pledge, viz., that the bonds were to be held for the unsecured balance of account (Wells, p. 63), and if it happened that the translation made by Wells is in accordance with his understanding of the pledge it rather strengthens our position.

Wells was testifying at this time as a witness for Fry, but he was first called by complainants, and in his version of the dealings of his firm with the Cavarocs, he stands on at least an equal footing with them, for while by their bankruptcy these gentlemen had all lost their direct personal interest in the matter, yet Wells had not misappropriated the bonds as Cavaroc seems to have done as against the complainants.

And so it was that when this question arose on settlement of the decree in the Court below, Judge Wallace held that the Cavarocs had agreed that these bonds should stand as security for any unpaid balance that might arise out of the transactions between Schuchardt & Sons and the New Orleans National Banking Association.

And this was just, for had Cavaroc & Son kept their faith and required and held the securities directed in many of the letters, and particularly in Well's memorandum given the younger Cavaroc and appearing at page 42, there would have been no uncovered or unsecured balance of account.

And if the Court below was right in its determination of the form of the guaranty, the cases are with us.

Thus, the result is determined, as was well stated in the opinion below, by the character of the undertaking of the surety in each case.

In Midland Banking Co. *vs.* Chambers, 38 L. J. Chanc., 478, the guarantee was to the extent of £300 balance of account.

There appears to have been a much larger balance; and

the creditor from other sources obtained payment of all but £410. Then the surety paid £300 out of this balance of £410.

Yet the creditor was allowed to prove in bankruptcy for the whole £410, though only £110 was due him, the Court holding that the former contract entitled the creditor to all dividends from the bankrupt's estate so long as he was not overpaid.

In Ellis *vs.* Emanuel, Law Rep., Exc. Div., p. 157, a question very similar to the one now before the Court arose.

The principal debtor with a surety executed a bond to secure £7,000, but it was expressly specified that the surety was not to be liable for over £1,300 in any event.

The debtor paid £1,000 on account of the bond, and upon being thrown into bankruptcy, a dividend on the balance of £6,000 was collected against his estate.

On application by the creditor to be allowed the *pro rata* share of dividends on the £1,300 on which he was liable, it was held that he must pay the whole £1,300 and take no share in the dividends, and he was also charged with interest on the £1,300.

Ex parte Hope, 3 M. D. & DeGex, 720, the agreement was express that the creditor should take all dividends until the excess over the amount of the guarantee was paid. The surety paid the guaranteed amount and recouped on other securities given him by the bankrupt, and then his assignee tried to make the creditor return him the dividend received on the amount he had paid in full by the surety.

Held that the creditor was entitled to his whole dividend and then to the amount guaranteed by the surety.

Ex parte Miles, DeGex, 623, in a continuing limited guarantee there was a proviso that if the creditors received a dividend from any estate of the principal debtor it should not be taken in discharge of the guarantee, but that the creditors should be entitled to recover on the guarantee to the full extent of the limit notwithstanding. On the bankruptcy of the principal debtors the creditors proved, and before receiving any dividend obtained, payment from the guarantors to the extent of

the limit. Held by Vice-Chancellor Knight Bruce that the guarantors were not entitled to stand in the place of the creditors as to so much of the proof as was equal to their payment, the creditor not yet having received 20/ on the pound, and dismissed the petition, without prejudice to a subsequent application, in the event of the creditors being paid in full.

Ex parte Copleston, 3 Deac, 546, holds when after proof of debt in bankruptcy surety paid part of the debt but not in discharge of the whole this does not prevent the creditor from receiving dividends upon the whole proof.

The cases which were cited below by the appellants here are upon guarantees of a different form. These cases were carefully considered by the learned Judge and distinguished.

Thus he says of Hobson *vs.* Bass, 6 Law Rep. Chanc. Appeals, 792, "The undertaking of the surety was construed as though it read, 'I guarantee the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250.'"

Of Rushmore *ex parte*, 10 Vesey, Jr., 409, the same interpretation substantially was placed upon the undertaking of the surety.

In Paley *vs.* Field, 12 Vesey, Jr., 435, the engagement of the surety recited the intention of the parties to be that the bankers should not be indemnified by the surety for any loss which they should sustain by giving credit to the principal debtor beyond the sum of £1,500.

The Master of the Rolls says: "The instrument marks distinctly that the sum for which the surety was to be answerable was, as against him, to be considered as the whole amount of the creditor's demand."

And then Judge Wallace says Bardwell *vs.* Lydall, 7 Bing., 489, is decided on the authority of Paley *vs.* Field, but upon the facts cannot be reconciled with it, the gurantee being to secure a running balance of account.

And so in Raikes *vs.* Todd, 8 Ad. & E., 846, guarantee held bad under Statute of Frauds; and in Thornton *vs.* McKewan, 1 H. & M., 525, the guarantee was to hold the

plaintiff harmless for advancing specified sums to the debtor from time to time as he might require.

In Gee *vs.* Pack, 33 L. J., N. S., 49, a note was pledged in security to pay in advance £300 now or hereafter to be made on banking account with a third person. It was there held that the document amounted to a promise to be liable for an advance to the extent of £300 and not a general promise to pay £300 on any balance, however arrived at or that may remain due on a general advance to the principal.

These were the main cases quoted below, and all went off on a different form of guarantee from that which we contend was the guarantee in this case.

The text books are founded upon these authorities, and, while they state the general principle correctly, do not discuss the form of the guaranty as do the cases. See

§ 499 Story's Equity Jurisprudence.

§ 1142 Story on Contracts.

It was argued on behalf of Fry in the court below that the doctrine of the appropriation of payments also applied in his favor, but this point was held against us by Judge Wallace. We respectfully submit, however, that the decisions of this Court do not of necessity hold that where the payment made on a claim is under legal proceedings it is to be appropriated to all the demands against the debtor ratably. The amount was paid to Mr. Fry by the receiver representing the debtor, and it became Fry's money. And we submit that he had a right to apply it as he saw fit.

It is quite possible, as between him and the debtor, that the rule contended for might apply, but the debtor makes no objection to the appropriation.

In Field *vs.* Holland, 6 Cranch, page 27, Chief-Justice Marshall (end of first paragraph on page 28) lays down the rule which we understand has ever since prevailed in the Federal Courts, and which, though questioned in various other States, seems now to be the law in the State of New York.

He says:

"It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

In 1 American Leading Cases, page 291, the above case is referred to.

In the note at page 293 is the following:

"If there had been no actual appropriation by the debtor at or before the payment, either express or inferential, his right to control the appropriation is gone. The right after that belongs to the creditor, who may make any application he pleases."

It is laid down on page 294, first paragraph, thus:

"If one debt is the sole obligation of the debtor and the other be with surety, the creditor may apply general payment to the debt which is not protected."

National Bank *vs.* Mechanic's Bank, 94 U. S., 437, 439, follows the rule laid down in Field *vs.* Holland.

Finally, the owners of the bonds did not come in and pay the $100,000 for which they were pledged.

It would have been better if they had done that before they had made this claim to subrogation.

On the contrary, they have always denied the debt.

It has been said, you cannot talk of subrogation until you have done your part, to wit, paid your debt. Pay first and talk of subrogation afterwards.

First National Bank *vs.* Wood, 71 N. Y., 411.
Ætna Life Insurance Co. *vs.* Middleport, 124 U. S., 534.

The account filed by Mr. Fry shows (pages 76 and 77 of the Record) that there was uncovered in the account of the New Orleans National Banking Association, arising out of its own drafts on foreign houses, for which no remittances of credits were ever made, more than $100,000 at the time it failed.

This was after the application of all collections from every source that Schuchardt & Sons and their trustees could get in to apply on account of the indebtedness of the New Orleans National Banking Association to them.

The account shows that the claim against the New Orleans National Banking Association was in the sum of $195,315.63.

For convenience, we deduct the $100,000 secured by these

bonds, and then show that there were never sufficient assets realized to pay the balance.

Of course, if further collections of any kind had been made so as to more than wipe out this unsecured balance, the surplus would belong to the appellants; but there have been no further collections made.

The account that has just been referred to was not questioned at the hearing.

Casey, one of the appellants' witnesses, admits, at page 32, folio 59, that the amount was $195,315.63.

Leupp goes over the entire details of the account again in the exhibit appearing at page 101 and following, showing that the real balance due is somewhat more than that claimed in the account filed with the Receiver, the difference arising from the fact that Schuchardt's claim was not admitted at its full amount by the Receiver of the New Orleans National Banking Association.

The proof in the case on the question of dividends paid is in the verified account of Fry.

There is, therefore, no question before this Court arising from the figures.

It will also be recollected in the consideration of this point that the relations between Cavaroc & Son and Schuchardt & Sons were those of pledgor and pledgee and there was no guaranty. In such cases the pledge is understood to be a security for the whole and every part of the debt unless it is otherwise stipulated between the parties.

Story on Bailments, Sec. 301.

The Schuchardt's had no personal demand against Cavaroc even up to $100,000.

He put the bonds in their hands and they accepted them, to secure $100,000 of the bank's debts or paper.

If the bonds had shrunk in value to almost nothing, that would have been Schuchardt's loss so far as security is concerned, but he could not have looked to Cavaroc for a cent; personally therefore, certainly, there was neither suretyship nor guaranty.

Nor was the deposit of the bonds a pledge of them to secure a guaranty. The bonds were collateral to the bank's

obligations, not to any obligations of Cavaroc's with respect to the Banking Association.

There was no guaranty at all in this case. If this interpretation is correct—that it was a pledge and there was no guaranty at all—then it would seem to settle the interpretation sought to be made by Cavaroc, against him, and to show conclusively that the bonds were pledged for the whole debt of the Banking Association, but the pledge limited in liability.

POINT IV.

Was the appellee Fry entitled to interest on the $100,000 for which the bonds in suit were pledged from January 12th, 1874, the date when the account was closed and proved against the Receiver of such Banking Association?

It was urged below that if Mr. Fry's contention was correct, that he could hold the bonds in suit to meet the uncovered balance of account to the extent of $100,000, he would be compelled to keep the account open until all assets of every nature were collected in, and thus lose the right to claim interest on such $100,000.

These views prevailed before the Master in the first instance, who reasons, at page 127, upon this question as follows:

"It nowhere appears from the evidence before me that the delay in settling up this matter was caused by any act of the owners of the bonds in question. The securities were at all times in the possession and control of the bank in the estate to be protected, and it nowhere appears that the delay in settling and adjusting the account in question is due to anything done or omitted to be done by the owners of the bonds herein hypothecated. The bonds were originally pledged to protect Schuchardt & Sons to the extent of $100,000, and until the final settlement of the estate in bankruptcy of the said Association, it cannot be definitely ascertained how much, over and above the dividends paid, will be due."

To this report Mr. Fry duly filed exceptions, and the same were sustained and interest ordered in favor of Fry.

The difficulty with the Master's reasoning seems to have been that he overlooked the fact that as a rule the pledgee owes no active duty.

The parties owing an active duty in the matter, were the owners of the bonds, who should have tendered Mr. Fry the amount due and demanded their bonds.

Neither does the question of interest depend upon the action or inaction of the owner of the claim. It depends on totally different questions to which we shall now refer.

The account between Frederick Schuchardt & Sons and the New Orleans National Banking Association was closed on the 12th day of January, 1874, when the last of the protested drafts came back from Europe.

The balance due at that time, as shown by Schedule "A," page 102 of Record, was $205,449.55.

This account was admitted by the Receiver of the New Orleans National Banking Association at only $195,315.63.

For the uncovered part of this balance, to the extent of $100,000, the bonds in suit were pledged.

That payment could have been made immediately, had the owners of the bonds so desired, and if it afterwards appeared that more than such balance was covered, the owners of the bonds would have been entitled to such surplus.

While, therefore, the account of the collection of assets for the covered portion of the debt might run through a long period, yet the obligation that these bonds were under, was determined at the date of the failure of the New Orleans National Banking Association by the existence of the fact required to make the bonds liable, to wit, an uncovered balance of account equaling $100,000.

This fact existed the day the New Orleans National Banking Association failed, no matter what length of time it might take to show that the drafts uncovered equalled or exceeded $100,000.

In other words, the status of the parties was established by the failure of the bank and its having neglected to cover drafts to the extent of $100,000.

The fact was then in existence, while the proofs might be delayed.

Or, on the 12th of January, 1874, the state of affairs was this:

There was a balance of account due Schuchardt & Sons from the New Orleans National Banking Association arising from the protest of drafts drawn by that association, which it had not made sufficient remittances under the terms of the pledge to cover.

Schuchardt & Sons then proceeded against all available assets at their command, including such dividends as they could obtain from the Receiver of the bankrupt bank, and applied these assets as collected on that part of the claim which it was not intended the bonds should cover, to wit, on that part covered by the bank in any form.

And the collections so made, leaving more than one hundred thousand dollars wholly uncovered, the pledge of the bonds in suit became operative as of the date of the failure of the bank.

Being liable for $100,000 as of the 12th day of January, 1874, a date three months subsequent to the failure of the bank, which we have taken for greater certainty, as the account was still open until that date, the bonds are liable to respond for every day's delay in the payment of that amount, with interest, which we respectfully submit necessarily follows by way of damages.

This is the case of pledge, not of guarantee nor of suretyship.

Story on Bailment, Section 306.

"The pledge applies, not only to the debt or other engagement, but also to the interest and all the incidental charges and expenses due thereon. If, for instance, a pledge is for a debt, it covers the interest upon the debt. If interest is expressly stipulated for, it follows from the presumed intention of the parties that the pledge is to cover both principal and interest. If interest is not stipulated for and yet is due *ex mora*, because of the unjust delay of the pledgor to pay the debt when he ought, that also in enquity is required to be paid, as well as the principal, before a redemption of the pledge is allowed—for here the rule of the Roman law justly applies: *Minus solvit, qui tardius solvit; nam et tempore minus solvitur.*"

2 Kent's Com., 583–584.

"And so, too, the interest accruing on the pledge is but an incident to it and a legal increase of the security."

Edwards' Bailments, p. 219, 2d Edit.

The pawnee may recover the costs of suit on the collateral security.

Edwards on Bailments, §§ 293, 299, 2d Edit.
Foot *vs.* Brown, 2 McLean, 369.

The pledge, however, covers the interest as well as the principal of the debt for which it is given in security, and its return cannot be demanded until payment in full has been made.

All contracts to pay money give a right to the interest from the time when the principal ought to be paid.

Williams *vs.* Sherman, 7 Wend. R., 109.
Edwards' Bailments, note 4, p. 219.

The interest, in short, is the incident or civil fruit of the money due.

Rens. Glass Factory *vs.* Reid, 5 Cowen, 587.
Same *vs.* Same, 3 *id.*, 393.
Louisiana Code, Art. 537–540.

Even if pledged without consent of the owner it may be deemed a pledge, so that the pledgor cannot redeem it except on discharging the obligation.

Story on Bailments, § 291. There is an implied warranty.
Edwards on Bailments, § 191.
Jarvis *vs.* Rogers, 13 Mass., 105.
Jarvis *vs.* Rogers, 15 *id.*, 389.

Brainerd *vs.* Jones, 18 N. Y., 35, holds:

"But although as far as interest is payable by the contract it is limited by the penalty, yet after the default of a surety in a bond for the payment of money, interest from the time of the breach may be recovered as damages, although the amount paid by the surety is thereby made to exceed the penalty of the bond."

From Burr *vs.* Wilcox, 22 N. Y., 551:

"On the same principle, where the stockholders of a corporation are by statute severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, this liability, from the time of the commencement of a suit for a debt exceeding the principal of the defendant's stock, brought to enforce it, is fixed for the specific sum equal to the amount of the stock; and the debt carries interest, although the amount of the creditor's recovery thereby exceeds the stockholder's original liability."

And in 2 Fonblanque Eq., 423, 1 Domat Book, 3, Title 5:

"It is a dictate of natural justice and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Everyone who contracts to pay money on a certain day, knows that if he fails to fulfill his contract he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the implied contract of the parties."

But it may be urged if appellants had paid the $100,000, would they not have been subrogated to Mr. Fry's position?

Not so, because the pledge of the bonds was to secure the uncovered balance of account, and Schuchardt & Sons had, therefore, the right to use every available asset of every kind that could be collected to pay the covered part, to wit, the secured part; and this included any dividends out of the estate of the bank that had drawn the drafts, whether the same were declared one draft or another.

It is true that the appellants could have paid when due the $100,000 and released the bonds; but, notwithstanding, Schuchardt & Sons were entitled to go on and collect the dividends of the bankrupt bank until the rest of their account was paid, and appellants, having neglected to pay the $100,000 when due, are justly chargeable with the damages Schuchardt & Sons sustained thereby, namely, the interest.

In conclusion upon this point, we call the attention of the Court to the case of Ellis *vs.* Emanuel, Law Rep. 1 Exc. Div., page 157, already referred to under the preceding point.

There the principal debtor and surety executed together a bond to secure £7,000, the surety not to be liable for over $1,300 in any event.

The principal debtor, having paid the £1,000, went into bankruptcy. The creditor proved for the full balance, £6,000, against his estate and obtained a dividend, and then, having sued the surety for the £1,300, somewhat more than that amount remaining yet unpaid, he recovered the same with interest.

Tha reasoning of the Master having gone somewhat upon the suggestion that it nowhere appears from the evidence that the delay in settling up this matter was caused by any act of the owners of the bonds in question, this leads naturally to the further finding in the Master's report that Mr. Fry was liable for certain uncollected coupons against which the City of New Orleans had interposed a defense of the Statute of Limitations, and which question we now present under.

POINT V.

Did Fry owe any active duty to enforce the coupons on the bonds which the City of New Orleans refused to pay until requested so to do?

The Master thought he did. At least, he reported as follows (see page 128 of Record):

"Through the oversight, inadvertence or omission of the custodian of the said bonds to demand the payment of interest and to seasonably institute suits therefor, the question is pending in the courts of Louisiana as to whether a large amount is or is not barred, from the Statute of Limitations."

And the Court below, in passing upon this question, at page 140, say:

"He is not liable for permitting the coupons to become outlawed, if that has happened. He has not omitted to perform any act required of him by

the parties who owned the bonds. It was for them to pay the pledge or to take care of their own securities."

The evidence upon this question was that of Mr. Fry, at folio 158, page 90, where he states that he was recommended a year or two since by counsel to institute proceedings to collect the unpaid coupons on these bonds.

That he was called upon by some one about it, and then saw his counsel, and was advised to do it.

That he thereupon retained counsel in New Orleans, and his account contains a statement of the result of those proceedings.

Mr. Platt, at folio 164, page 94, testifies upon this point, that Mr. Hutchins, who, the record shows, is the complainant's solicitor, first approached him on the subject, whereupon he consulted with Mr. Fry.

The subject on which he was so consulted was (page 95) to advise Fry, on the request made by complainant's counsel, to institute proceedings in New Orleans to collect the unpaid coupons.

There were a number of consultations, and it seemed to be involving the witness and his client in another long and tedious litigation about the bonds.

But he adds :

"However, as it was for the interest of those ultimately interested in the bonds, and I considered that under the present ideas of Mr. Fry's relations he was bound to do all he reasonably could to lessen the loss that the other parties might endure, even at any trouble and labor, I could not help getting him and myself into this new litigation, and accordingly prepared his case and retained the counsel in New Orleans whom I thought best qualified to carry the matter through."

This is the only evidence in the case of any request on Mr. Fry to institute proceedings to collect coupons that the city refused to pay; and as the evidence further clearly shows that he immediately proceeded and collected all the coupons he could, it is respectfully submitted that if the plea of the Statute of Limitations has availed against a certain small amount of the coupons, Mr. Fry is under no liability therefor.

We have always understood the law to be that the pledgee is not bound to move in the collection of coupons on bonds

pledged, nor in any other manner, until requested by the owners of the pledge.

The criterion by which to determine in any and every case whether a creditor has done or omitted to do anything which has the effect to exonerate the surety is stated thus in Story's Equity Jurisprudence, Sec. 325 :

"If the creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any *act when required by the surety* which his duty requires him to do, and the omission proves injurious to the surety, in all such cases the latter w'll be discharged and he may set up such conduct as a defence to any suit brought against him if not at law at all suits in equity."

Story Eq. Jurisp., §327.
Schroeppel *vs.* Shaw, 3 N. Y., 446.

There the surety complained that creditor failed to collect a bond and mortgage held as collateral security and allowed it to run unpursued and unenforced for years, during any of which time it could have been collected.

When finally foreclosed, bondsman was insolvent and mortgaged premises largely deteriorated in value.

On bill filed by surety to be released from judgment against him on his contract of suretyship on proof of above facts :

Held that he was entitled to no relief.

That he should have paid his own obligation, and then enforced the mortgage and that pledge, owed him no duty (at least until required to do so) to enforce the pledge.

McKechnie *vs.* Ward, 58 N. Y., 541.

Clark *vs.* Sickler, 64 N. Y., 231.

(Where creditor was offered the amount due by principal debtor, but requested him to retain it, and the debt was lost by the subsequent insolvency of debtor.)

Neither was Fry bound to know the Statute of Limitations of Louisiana.

He did present the coupons for payment; payment was refused, and he had no right to go into litigation on the question until at least some of the parties interested requested it.

The duty an involuntary trustee owes in reference to trusts is well laid down in Riggs *vs.* Purcell, 89 N. Y., 611.

POINT VI.

Having, at the request of the appellees, caused suits to be instituted to collect such coupons, had Fry the right to be allowed his necessary counsel fees for the performance of such services?

Striving first to hold Mr. Fry for an alleged responsibility for not enforcing these coupons, the appellants next, when on their request he instituted suits against the city, criticise the amount of and seek to charge Mr. Fry with the counsel fees he paid in such litigations.

It would seem to be the general rule that a pledgee is entitled to be reimbursed for the expenses incurred by him about the pledge where they are necessary and proper for its protection and preservation.

Story on Bailments, Sec. 306a.

The amounts paid by Mr. Fry, as shown by his account, for the services in these litigations were: To his New York counsel, $1,250; to his New Orleans counsel, Messrs. Rouse & Grant, a retainer of $1,000, and on account of disbursements, $60; and these gentlemen then deducted from the amounts collected $8,188.01, in addition to the retainer so paid them. These figures appear at page 79 of the record.

The evidence of Mr. Grant, at page 106 and following, of the record, gives a history of the litigations he was compelled to bring.

To the suit on the coupons from June, 1875, to December, 1880, including coupons due in June and December, 1875, the City of New Orleans pleaded the prescription of five years, and that suit was discontinued to avoid that question affecting a recovery on the rest of the coupons.

Then judgment was recovered against the City of New Orleans for $81,200, with interest from the maturities of the several coupons in suit, being exclusive of the June and December, 1875, coupons, for which a separate suit was

brought, which had not been tried at the time the deposition was taken.

Then another suit was brought, and judgments recovered for coupons maturing June, 1881.

Executions were issued on both of such judgments and returned unsatisfied.

Thereupon a petition was filed by Fry against the City of New Orleans.

A mandamus was obtained directing the levy of a tax sufficient to pay the large judgment, and the suit resulted in a mandamus directing the levying of a tax for the smaller judgment.

Still other suits were brought for later coupons, and then the City of New Orleans sued Mr. Fry for taxes on the judgments which Fry had recovered, which suit Fry was compelled to defend.

The State Comptroller strove to sell the judgments in satisfaction of the tax, and Fry was obliged to and did enjoin the prosecution of such suits.

The result of all these litigations was that $77,853 were collected on account of these coupons.

This was the testimony at the time the deposition was taken. The account filed by Mr. Fry shows the collection of some further sums afterwards.

The witness then, at considerable length, gives the trouble he was put to and the work performed in this case, including a journey to the Supreme Court of the United States on application by the City of New Orleans for a writ of error in one of the cases, which was subsequently dismissed for want of prosecution.

Ten per cent. was charged by Mr. Fry's counsel in New Orleans for their services in collecting these moneys.

The reasonableness of such charge is sustained very fully by the evidence of Mr. Grant and by that of Messrs. Lewis and Huntingdon, practising lawyers in the City of New Orleans. (See pages 111 and 112 of the record.)

We, therefore, respectfully submit that the rules of law applicable require the allowance of their charges made against the pledgee in protecting his pledge at the request of the owners.

POINT VII.

Was Mr. Fry entitled to be paid a reasonable allowance for a safe deposit vault in which to keep these bonds?

This question was raised below, the account showing at page 79: "Vault rent for the years 1881, 1882 and 1883, $300."

The evidence of the witness Leupp, at folio 153, page 86, shows that these sums were paid out for the rent of a safe for the deposit of these bonds. The principles referred to in the preceding point justify the allowance of this item if objection to it should be made before this Court.

POINT VIII.

Did Fry perform his duty in depositing the moneys collected on account of these coupons with a banking institution in the City of New York, and is he liable to account to the appellants for any further interest than he received from such banking institution?

This question is not very important in amount, as the moneys were received between April and December, 1882, and the account was presented and interest computed down to December, 1882, in the Court below.

The account (page 79) shows the remitting by Rouse & Grant of certain installments collected by them on account of the coupons referred to in a preceding point at certain specified dates.

And then immediately below follows a statement that these remittances were subject to certain deductions for ex-

change ; and the net amounts received by Mr. Fry are then given.

These remittances were deposited in the Bank of New York, of which Mr. Fry was president.

A pass book was kept, and produced at the hearing, which contained the amount of moneys received for these coupons, after deducting the charges of the New Orleans lawyers and exchange, and the rate of interest allowed by the Bank of New York on such deposit was two and one-half per cent., which was accounted for by Fry. (See the evidence of Fry at page 88, and a copy of this pass book at page 106).

The appellants claim that Fry should have been charged with interest at six per cent.

The whole question involved was whether or not Mr. Fry had the right to apply these moneys as fast as received on account of his claims, or whether he was bound to hold the same until the Court should adjudicate such claims.

Both the Master and the Court below held with us on this point, Judge Wallace saying, page 140 :

"Contrary to my first impression, the money collected by Fry is to be treated as merely a substitute for the bonds. He had no right to apply it to the extinguishment of the debt, and as he did not do so, is chargeable with only what it earned, which is the interest he has received on it."

The argument sustaining this rule may be stated thus :

The parties by their pleadings under oath have estopped themselves from raising this question. They assert that these coupons were not pledged for the debt, and from the date of Cavaroc's last letter immediately after his failure, they took this ground. They certainly cannot now in the face of their pleadings, oaths and assumptions turn round and claim relief on a contradictory basis.

Nor is the suggestion that Fry was bound to apply this money as received, in reduction of the indebtedness in accordance with latest authority on the subject.

The true principal is—

The pledgee is not bound to pay himself in installments.

In the absence of an agreement to that effect, the debtor

has no right to insist upon paying a demand loan in installments.

Farwell *vs.* Importers, &c., National Bank, 90 N. Y., top page 490.

In that case the bank had loaned to a firm of brokers $50,000 and took as collateral a number of notes.

Shortly afterwards plaintiffs notified the bank that one of the notes for $6,521.30, made by them, had been fraudulently pledged.

It was held that the bank, having loaned money on the faith of the note, was protected, but that if the other collaterals were sufficient to pay the loan the amount collected on this note must be returned.

The bank claimed, however, that when this note was collected only part of the indebtedness had been paid, and that was immediately applied on balance due.

Court held, however, that the bank could not so apply the same in absence of notice to pledgor to redeem, and that, page 490 :

"The bank's only duty was to collect the notes held as collateral as they respectively fell due and to hold the proceeds as a substitute for the notes collected."

This being the law, and Fry being restrained by the hostile attitude of the other parties, and by this action, from giving notice or proceeding to compel redemption, he fulfilled his entire duty in collecting the coupons and depositing the money received in a proper city bank on call and at Trust Company interest.

He might have been compelled to do this.

The moment the principle we contend for is admitted, viz., that he should keep the proceeds of the coupons as he would otherwise have kept the coupons, and that he could not properly apply the same on the debt, the result follows that he is liable only for what the money could earn.

Merchants' and Traders' Bank *vs.* The Mayor, 97 N. Y., 362

And the principle, that when a mortagee in possession has retained money without investing it, under a mistake, does

not render him liable for interest, is applicable in this point.

Gordon *vs.* Lewis, 2 Sumner, 143, 144.
Gibson *vs.* Crehore, 5 Pick., 146.
Jenkins *vs.* Eldridge, 3 Story, 325.
Hogan *vs.* Stone, 1 Alabama, 496.

For the profits of the pledge, the pledgee always accounts —and where he has used such profits they are of course credited on the debt.

Story on Bailment. Sec. 343.

"Another duty of the pawnee at the common law is, to render a due account of all the income, profits and advantages derived by him from the pledge in all cases where such an account is within the scope of the bailment. If, for instance, the pawn is a slave, the profits of his labor are to be accounted for. If the pawn consists of cows, horses or other cattle, the profits of their labor are also to be accounted for, if within the contemplation of the parties. The Roman and Foreign law seems in all cases of this sort to imply an obligation to account, from the very nature of such a pledge. In rendering an account of the profits, the pawnee is at liberty to charge all the necessary costs and expenses to which he has been put, and to deduct them from the income or profit."

Story on Bailments, Sec. 331.

"The Roman law and French law do not, in respect to the right of using pawns, seem materially to differ from the common law, unless there is an exception furnished by the rule thereof, that, where the pawn is used (as if a cow is milked), and a profit is obtained thereby, the pawnee shall be bound to account for the profits, deducting all expenses for the keeping. By the law of Louisiana, the fruits of the pledge are deemed to make a part of it, and the pledgee cannot appropriate them to his own use, but is bound to account for them. Mr. Chancellor Kent seems to think that the rule in the common law is, or at least ought to be, the same. And his doctrine certainly carries with it a most persuasive equity, although as we have seen it seems inconsistent with the rule laid down in some of the authorities."

A much more serious question arose on the question of Fry being charged with interest on the amount of the coupons collected by Schuchardt & Sons before their bankruptcy.

The evidence showed that Fry had always kept these moneys on hand in accordance with an entry made originally in his check book at the time of the opening of his

account, as follows: "$24,334.70 proceeds of collected coupons from N. O. City Bonds, claimed by F. Dumont & Co. and C. Cavaroc & Son, and held as collateral for balance due by Cavaroc & Son." (See memorandum at bottom of page 96, and Fry's evidence, pages 88 and 89.)

The Court, however, held against us on this, and compelled us to pay seven per cent interest down to the time the Statute of the State of New York altering the rate of interest went into effect, and six per cent thereafter.

OTHER MINOR QUESTIONS.

A question was made in the court below as to the rate of interest claimed by Fry on this $100,000, and on the balance recovered under his banker's lien against Cavaroc & Son.

The interest allowed was at the legal rate of the State of New York, seven per cent to January 1st, 1880, and six per cent thereafter.

An attempt was made to show that four per cent was the rate of interest charged on the Cavaroc account with the Schuchardts; and an answer to such effect was given, at folio 154, page 87, by the witness Leupp; but he corrects this at page 90 by stating that on examination he finds that the rate of interest charged against Cavaroc & Son was seven per cent., and when they had a credit balance they were allowed four per cent.

This is in accordance with the credited interest in Exhibit "B" appearing at pages 99 and 100.

The only other contention made as to the rate of interest in the court below was that the rate in Louisiana, five per cent, should prevail; but inasmuch as the evidence of the witness Leupp shows that Cavaroc & Son were always charged seven per cent. when their account was overdrawn, and the entire transactions, so far as the advancing of money is concerned, took place in the city of New York, and that was the place of payment, it would seem to necessarily follow that damages in the way of interest should be allowed at the legal rate prevailing in that State. See the following cases:

Lanusse *v.* Barker, 3 Wheaton, 146.

Bank of U. S. *v.* Daniell, 12 Peters, 54.
Bell *v.* Bruen, 1 Howard, 182.

The Court below also found that Fry had a lien by virtue of his attachment upon the interest of the claimants for the sum which might ultimately be recovered in a certain suit instituted by Schuchardt & Sons against the complainants. (See page 70.)

Nothing was done under this attachment. Fry was paid out of the proceeds of the sale of the bonds sold, the amoun-decreed in the court below, and all claim under this attachment was dropped; and this statement accounts for its disappearance from the case.

NINTH POINT.

Can the appellants maintain these appeals, even if error be shown in any of the foregoing matters, because of want of jurisdiction in this court, and the court below, to entertain the case for "want of equity?"

The original bill of complaint simply asserts that the complainants are the lawful owners of the bonds in suit which are alleged to be in the possession of Charles M. Fry; demand on, and refusal to deliver by, said Fry, accompanied with a claim to hold the same as collateral security for certain sums alleged to be due him from the appellants, E. H. Reynes and Francois Laborde, assignees of C. Cavaroc & Son, and from the Receiver of the New Orleans National Banking Association; a denial by complainants of such lien, and an averment, &c., that the appellee, E. H. Reynes and Francois Laborde, assignees of C. Cavaroc & Son, and the Receiver of the New Orleans National Banking Association claim to have liens upon said bonds, or some portion thereof, the exact amount of which complainants are ignorant concerning, and the validity of which they dispute.

This is the entire bill, and in consideration thereof complainants asked relief in a court of equity that Fry be adjudged to deliver over to complainants the said bonds and certain moneys in his hands as proceeds of the coupons of said bonds. The questions as to moneys on deposit with the Union Bank of London went out of the case long before trial.

The bill was clearly filed upon the basis of the complainants' ownership of the bonds, and their right to the possession of them, and for this they could have maintained assumpsit, trover or replevin at common law.

The amended bill is but little better. Instead of averring that complainants are the lawful owners, they aver that they are, in equity, the joint owners with the defendants Laborde and Reynes, assignees of C. Cavaroc & Son, of the bonds in suit which it is alleged were, at the time of the adjudication of Schuchardt & Sons as bankrupts, in their possession, and were, at the time of the filing of such bill, in the possession of their trustee, Charles M. Fry. That said bonds were purchased by C. Cavaroc & Son with the money of complainants, for the joint account of complainants and said C. Cavaroc & Son, but not in the name of complainants, nor in the joint names of complainants and C. Cavaroc & Son, and for such reason they aver that they are unable to enforce their claims to these bonds in a suit at law, and are compelled to seek relief in a court of equity. Then follow allegations of demand of the bonds of Fry, and of certain moneys received by Fry for the coupons thereon, and his refusal to deliver on the claim that he held the same as collateral security for the matters mentioned in the original bill, and then follow a denial of such hypothecation, and the same allegations as to money on deposit in the Union Bank of London that appeared in the original bill; then an allegation that for the proper determination of the rights of complainants it would be necessary to examine into the accounts of the dealings between them and the firm of C. Cavaroc & Son, by whom said bonds were bought on joint account, and also between the said firm of C. Cavaroc & Son and the New Orleans National Banking Association and the firm of F. Schuchardt & Sons, and then a statement that the complainants cannot obtain adequate, specific and perfect relief by any action at law, and that such relief as they could obtain, could only be had by bringing separate suit against the defendants above named, thus involving multiplicity of suits; and that the defendants, except the Louisiana National Bank, are trustees under the laws of the United States, and are for that reason within the jurisdiction of this court and equity. The bill then asserts that complainants are informed that Laborde and Reynes, assignees of Cavaroc & Son, the Louisiana National Bank of New Orleans, and the Receiver of the New Orleans National Banking Association of New Orleans claim liens on said bonds, the amount of which the complainants are ignorant, and then they pray judgment that Fry be adjudged to deliver over to the complainants the said bonds and moneys representing the coupons in his hands, and that the defendants, Laborde and Reynes, assignees of Charles Cavaroc & Son, may set forth the amount of all and every sum of money received and expended by them and by Cavaroc & Son, or by any other person by their order on account of which they have an interest in or claim on said bonds, and that if it shall appear to the Court that Fry, as trustee of Schuchardt & Sons has any right to hold said bonds as collateral for any indebtedness, that he may set forth a full account of all the items of indebtedness for which he claims to hold the bond, and that the right of the said Fry and the Receiver of the New Orleans National Banking Association to the moneys deposited as aforesaid in the Union Bank of London may be settled and applied to the proper account.

The only difference between this bill and the old one, so far as the substance is concerned, is the admission that the defendants Laborde and Reynes, as assignees of C. Cavaroc & Son, had an interest in the bonds, and the Court is asked, as ground for entertaining jurisdiction in equity, to decide the respective interests of these two sets of claimants who are both now appellants, and to turn over to them the bonds on which Fry claims a lien.

There was nothing to prevent these gentlemen joining as complainants in a suit brought for the recovery of the bonds which they could have prosecuted at common law, and then when the bonds had been obtained, they could have divided the spoils as they saw fit. Indeed, the subsequent proceedings in this action show that they had little difficulty in that regard. The Union Bank matter was out of the case as before stated, and no party appeared in the action excepting those now litigating in this court.

The answer of Laborde and Reynes, the assignees of Cavaroc & Son, in addition to the matters set forth in the amended bill, merely denies any knowledge of an averment in Fry's answer concerning an attachment.

Fry, for answer, denies that complainants are the lawful owners of the bonds in suit; admits that they were in the possession of Schuchardt & Sons at the time of their adjudication as bankrupts and that they are now in his possession; denies that he holds any moneys as the result of the sale of coupons; avers that Schuchardt & Sons, at the times referred to in the allegation, were bankers, factors and commission merchants doing business in New York, and as such acted for Charles Cavaroc & Son of New Orleans and the New Orleans National Banking Association, both of whom are bankrupts; that the said bonds were negotiable bonds, and were deposited with Schuchardt & Sons as security for any indebtedness or balance of account which at any time might or could arise in the course of their dealings with Cavaroc & Son and the New Orleans Banking Association; that the result of such dealings was that Cavaroc & Son became indebted to Schuchardt & Son as of the 9th day of February, in the year 1875, in a sum stated, and the New Orleans Banking Association in a certain further sum stated, and claims the right to hold the aforesaid bonds as security for the payment of the aforesaid indebtedness, and asks that such indebtedness be adjudicated and settled and that the bonds be sold and the proceeds applied in payment of such indebtedness; then follows an allegation that the amount due on said bonds may be increased from the result of litigation set forth in the answer; then follows an allegation concerning the money alleged to be on deposit with the Union Bank of London, which is, however, withdrawn by the amended answer; then follows an allegation as to a certain attachment against the complainant's interest in these bonds issued by Schuchardt & Sons and under which Fry claims an interest in the same.

The final decree (page 146) adjudged that Fry had a lien on the bonds for a specific sum, and directed them to be sold to pay such sum, and then, at folio 259, directed Fry to deliver up the balance of the bonds and any moneys that might have come into his hands, less his necessary expenses in collecting the same as the proceeds of coupons on said bonds, and also the detached coupons, and all claims and judgments on coupons and all moneys which have been collected by Fry, and not previously accounted, for to Edgar A. Hutchings, the attorney for the complainants, and Man & Parsons, the attorneys for the defendant E. H. Reynes, surviving assignee of Charles Cavaroc & Son, upon the joint receipt of said attorneys who were to divide the same between those parties in the proportion of 74 per cent. to the complainant, and 26 per cent. to the defendant E. H. Reynes, as surviving assignee of Charles Cavaroc & Son, in pursuance of a stipulation between those parties, signed by their respective attorneys, and filed herein.

Whatever, therefore, may have been the allegations of the pleadings when the case was heard and decree was entered, the complainants and the defendant Reynes, as assignee of C. Cavaroc & Son, had been able by stipulation to adjust their interest in the bonds, and were in a position on a proper tender to have enforced their rights at common law.

In other words, by this form of action and this assumption of jurisdiction, the owner of the bonds avoided a tender, and sought to try the issue of Fry's lien and the amount thereof, without being under the responsibilities properly belonging to them had they made an insufficient tender, and then sued at common law for their bonds.

The defendant Fry, in this action, did not demur or answer specially to the bill for its lack of jurisdiction, but Fry did start his answer, "saving and reserving to himself all and all manner of benefit and exception to the many errors and uncertainties and imperfections in the complainants' bill of complaint."

Now, we submit to the Court, that it appearing by the amended bill and the proofs that the complainant could have had an effectual and complete remedy in a court of

law, and that such remedy was clear and certain, the complainant should not have been allowed to maintain this action.

Such is the common rule.

Kemp *vs.* Tucker, Law Reports, 8 Chancery Appeals, 369.
Lynch *vs.* Willard, 6 Johns. Ch., 342.
Reed *vs.* Bank of Newburgh, 1 Paige, 215.
Kemp *vs.* McPherson, 7 Har. & J., 320.
Caldwell *vs.* Knott, 10 Yerger, 209.
Hoare *vs.* Contencin, 1 Brown, Ch. R., 27, 29. (Note.)
Hammond *vs.* Messenger, 9 Sim., 327.
Stansbury *vs.* Arkwright, 6 *id.*, 481.
Pierpont *vs.* Fowle, 2 Wood. & M., 23.
Smith *vs.* Morehead, 6 Jones Eq. (N. C.), 360.

There are cases holding that this objection must be taken at the earliest moment, and that if the defendant in a suit in equity answers and submits to the jurisdiction of the Court, it is too late for him afterwards to say that the complainant had an adequate remedy at law.

But such does not seem to be the rule in the United States Courts.

Section 723 of the Revised Statutes of the United States, being the 16th section of the judiciary act of 1789, provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

And see:

Robinson *vs.* Campbell, 3 Wheaton, 212.
Hipp *vs.* Babin, 19 How., 271.
Thompson *vs.* R.R. Co., 6 Wall, 134.

Lacombe *vs.* Forstall's Sons, 123 U. S., 562, a case involving the pledge and sale of a lot of bonds, in which it was held the claimants had adequate remedy at common law and should not have gone into equity.

And in Lewis *vs.* Cocks, 23 Wall., 466, this statute was con-

sidered and applied by this Court. In that case a bill in equity had been filed to recover possession of land, there being no fraud in the case, nor other matters specially the subject of equity cognizance; there was a colorable suggestion of fraud, account, &c., used to make the bill take the place of the common law remedy of ejectment. The Court, after examining the evidence, say that the action seems to be nothing but one of ejectment in the form of a bill in chancery; the charges of fraud, the court hold, are not sustained, and there being a plain and adequate remedy at law, a court of equity should not interpose. This principle, the Court say, "in the English equity jurisdiction is as old as the earliest period of its recorded law."

The section of the U. S. Statute in question is then quoted, and the Court say that it is merely declaratory and made no change in the pre-existing law, and then the Court go on: "In the present case the objection was not made by demurrer, plea nor answer, nor was it suggested by counsel; nevertheless, if it clearly exists, it is the duty of the Court, *sua sponte*, to recognize it and give it effect."

"It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title," and thereupon the Court reversed the decree and remanded the case with directions.

To the same effect, Hipp *vs.* Babin, 19 How., 271, and in Thompson *vs.* Railroad Companies, 6 Wall., 134, 137, Judge Davis uses this expression:

> "Usually when a case is not cognizable in a court of equity the objection is interposed in the first instance, but if a plain defect of jurisdiction appears at *the hearing or on appeal*, a court of equity will not make a decree."

And in Smith *vs.* Bourbon County, 127 U. S., 112, it is held that lack of jurisdiction by reason of want of equity is a matter of substance and cannot be waived and cannot be ignored.

And in questions involving a want of jurisdiction the Court, when necessary, acts of its own motion.

Hegler *vs.* Faulkner, 127 U. S., 482.
Glacier Mountain Co. *vs.* Willis, 127 U. S., 471.

If it be the case, then, that the Court below had no jurisdiction, it follows that it had no power to do anything except to dismiss the bill. This point seems to be clear, as was held in the case of The Mayor *vs.* Cooper, 6 Wall., 247. In that case the defendant seems to have presented a petition for the removal of the cause, and then a motion was made to dismiss the suit upon the ground that the Court had no jurisdiction. This motion was sustained by the Court, and the case dismissed and the defendants ordered to pay all the costs incurred in this Court for which execution may issue. The Supreme Court say on this point, though first holding there was jurisdiction, "Before adverting to the constitutional question, there is another feature of the order which calls for remark. The Court held that it had no jurisdiction whatever of the case, and yet gave a judgment for the costs of the motion and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but strike the case from the docket. In that view of the subject, the matter was as much *coram non judice* as anything else could be, and the award of costs and execution was consequently void. Such was the necessary result of the conclusions of the Court." And thereupon the order of the Court below was reversed and the case remitted with directions that the Court proceed in it according to law.

Now, in the present case, Charles M. Fry did not by demurrer, answer, or in any other manner specifically raise the objection of want of jurisdiction in the Court below, and the Court went on and made a decree from which he did not appeal. He does not now ask that the judgment entered by the Court be reversed or set aside; he does not ask that the case be remanded for further proceeding; he has no right to do so, for he is not an appellant; he obeyed the judgment rendered, turned over 142 bonds, transferred a large amount of cash and assigned a number of judgments on coupons to the appellants here, and whether that judgment, and that action under it, may be treated in the future as an arbitration, award and satisfaction is a question to be determined between him and the appellants if

this Court shall now hold that by reason of the want of equity in the case there was no jurisdiction in the Court below, and there is no jurisdiction here to entertain or considered the same. In other words, the contention now made by Mr. Fry is that having submitted to the entry of the judgment, and having obeyed it, he has the right now to call the attention of this Court to the section of the statute which says that suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law, as a reason for this Court not interfering with the judgment of the Court below by modifying or altering it, or otherwise assuming a jurisdiction which is apparently cut off by statute.

And inasmuch as this Court would seem to have no greater right than had the Court below to adjudicate upon a bill and case so manifestly lacking in any allegations sustaining jurisdiction in a court of equity, he respectfully submits that the appeal of the complainant and the defendant Reynes should be dismissed.

And under this head may be considered the proposition that the appellants having taken a certain position in this action are estopped from acting inconsistently therewith.

They went into the court below and asked that Fry be directed to deliver them the bonds unless he establish a lien, in which case they asked that such lien be adjudicated, and, presumably, that after the satisfaction of such lien the balance of the bonds be delivered over to them.

Now, they obtained just such a decree, and the balance of the bonds in excess of 92 sold to satisfy Fry's lien, were delivered over to them.

Having obtained their decree and recovered their bonds, can they now change their base and ask a reversal of such decree?

It is claimed by Fry that parties cannot assume inconsistent positions, and that the appellants having the choice of two positions, viz., one to pursue Fry at common law for the bonds, and the other to settle in some manner as they did in the court below the amount of his lien, pay it and get their bonds.

They adopted the latter course, which was inconsistent with the first one; settled with Fry by the decree below, the amount of his lien, paid it, and got their bonds.

Having received the full benefits of such decree, it is respectfully submitted they should not now be allowed to appeal from it.

For instance, it is held that a party cannot claim the benefit of a judgment and at the same time appeal from it.

Kelly *vs.* Bloom, 17 Abb. Pr., 229.
Bennett *vs.* Van Syckel, 18 N. Y., 483.
Lentz *vs.* Lamplugh, 12 Pa., 346.
Eaton's Appeal, 83 Pa. St., 155.
Vail *vs.* Remsen, 7 Paige, 206.
Radway *vs.* Graham, 4 Abb. Pr., 468.

Mr. Bigelow in his work on Estoppel, Chap. 24, p. 687, 4th, Ed., says: It may accordingly be laid down as a broad proposition that one who has taken a particular position in the course of a litigation, must, while that position remains unretracted, act consistently with it.

And so in Hughes *vs.* Dundee Mortgage Company, 28 Fed. Reporter, 40, it was held in substance that a party cannot maintain a writ of error to reverse a judgment and also an execution to enforce it.

The precise question determined in that case was that a party could not maintain a writ of error to reverse a judgment, and at the same time plead it in bar of another action.

And in Railroad Company *vs.* McCarthy, 96 U. S., 267, the Court, in speaking of an attempt of the railway company on the hearing in the Supreme Court to excuse itself for the non-performance of a contract to carry certain cattle, on the ground that the act would have been in violation of the Sunday Law of West Virginia, when it appeared that on the trial in the Court below it had relied on the fact that it was impossible to forward the cattle on Sunday for the want of cars, said:

"This point was an afterthought suggested by the pressure and exigencies of the case. When a party gives a reason for his conduct and decision, touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different considera-

tion. He is not permitted thus to mend his hold. He is estopped from so doing by a settled principle of law."

And thus in the case at bar, the appellants having obtained their bonds in pursuance of a decree of their own seeking, should not now be permitted to ask the destruction of such decree.

And this position, we submit, is in accordance with, rather than in conflict with, Emory *vs.* Palmer, 107 U. S., 3, 8.

LAST POINT.

It is respectfully submitted that for the reasons stated in the last point the appeals should be dismissed. But if the Court considers it proper to entertain the appeals, then, for the reasons stated in the earlier points of this brief, the decree should be in all things affirmed.

JOHN M. BOWERS,
Of Counsel for Charles M. Fry, Appellee.

It may be proper to say of the concluding clause of the Brief filed on behalf of Dumont that the learned counsel who prepared the same labors under a grave misapprehension as to the facts of the case of Casey *vs.* Schuchardt (6 Otto, 494).

The securities therein referred to were never taken by Schuchardt & Sons at all. Cavaroc, in accordance with his arrangement with Schuchardt & Sons, ought to have exacted such securities, and, if he had, the indebtedness of the New Orleans Bank to Schuchardt & Sons would have been correspondingly reduced.

But Schuchardt & Sons were protected in any event by the deposit of the bonds in suit and consequently they took no care as to further security.

Supreme Court of the United States,

OCTOBER TERM, 1888.

EDWARD H. REYNES, Assignee, &c.,
Appellants,

vs.

FREDERIC DUMONT et al.,
Appellees.

FREDERIC DUMONT et al.,
Appellants,

vs.

CHARLES M. FRY, Trustee, &c.,
Appellees.

Supplementary Observations by Counsel for Chas. M. Fry, Appellee.

JAMES C. CARTER,
Of Counsel.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER, 89 NASSAU ST. COR. FULTON.

1889.

Supreme Court of the United States,

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EDWARD H. REYNES, Assignee, &c.,
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vs.

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Appellees.

FREDERIC DUMONT *et al.*,
Appellants,

vs.

CHARLES M. FRY, Trustee, &c.,
Appellees.

No. 174.

Supplementary observations by counsel for Charles M. Fry, appellee, in connection with the case of Ellis vs. Emmanuel, Law Rep., 1 Ex. Div., 157.

The question in this case was precisely as in the one at bar, whether, the guaranty being limited in amount and the whole debt exceeding that amount, dividends received from the bankrupt estate of the debtor were to be apportioned.

It was fully recognized that this depended upon the

terms of the contract alone, and consequently the only task before the Court was to interpret the contract.

The Court came to the conclusion that the real intent of the parties was that the creditor should first be paid his whole debt before any of the sureties should be entitled to dividends from the insolvent estate; but Mr. Justice Blackburn, who drew up the opinion, seeing that the conclusion was different in this respect from that reached in a number of prior cases of limited guarantees, seemed to think that it was necessary to distinguish them and to show that they did not apply to the case before him.

It would seem to have been a sufficient performance of this task to declare that the courts in those cases had proceeded upon the same principle as the court had in the one before him, but had found the intent of the sureties to be not to secure the final balance which might remain after deducting all payments received from the principal debtor limiting the amount of liability to a specified sum, but to secure a *limited part* of the debt. He, however, deemed it important to go beyond this and to endeavor to *extract* from the prior cases a rule for the *interpretation of the contract* in cases of limited guaranties.

Finding that the prior cases, or most of them, were instances of continuing guaranties of floating balances, whereas in the case before him the guaranty was of an existing and ascertained debt, he seizes upon this distinction as a foundation for a rule, and suggests that the rule should be that where the guaranty is of a *floating balance* the *prima facie* construction should be that the parties intended to limit the guaranty to a *part* of the debt to be incurred, but where the guaranty was of an existing and ascertained debt, he would not say that the *prima facie* construction was the other way, but that there was no presumption at all in favor of one view in preference to the others (pp. 163, 168, 169).

The nature of such a conclusion is exceedingly doubtful. To make a particular matter of fact the principal foundation for a rule for ascertaining the intentions of parties because it *happens* to have been present in most of the cases where the same interpretation of intention was adopted is a

hazardous piece of reasoning. The inductive method requires a numerous body of instances, or the aid and correction of other modes of reasoning before its conclusions can be relied upon with confidence. It is doubtful whether in ascertaining the intent of parties to contracts, where it is not definitely expressed, any rules except the very general and obvious ones are of substantial service. As in the case of wills the best method in general is to take the facts and circumstances as they stand and endeavor, unembarassed by formal rules, to reach, as best we may, the real purposes of the parties (Miller, J., in Clarke *vs.* Boorman's Executors, 19 Wall., 492, 502).

Mr. Justice Blackburn seemed, indeed, to feel that it was necessary to assign some *reason* for imputing such importance to the circumstance that the guaranty was of a floating balance, and the reason he assigned was one having nothing to do with *intention*, which was the very matter in question! The reason was that it was "*inequitable* in the creditor, who is at liberty to extend the balance or not to increase it at the expense of the surety."

But what if the creditor *wishes* the amount of the debt to be increased, which may be as often the case as otherwise? Indeed, it would seem very clear that where the debtor desires a credit which from the nature of the business must be *indefinite*, and which cannot well be limited to a specific sum, and a limited guarantee is given, the notion of the parties must be that the creditor may run in debt as much as he chooses, and that he may rely on the surety for a certain sum to cover himself against loss, and for any excess must content himself with a resort to the debtor alone.

Turn the matter which way we will, it all comes back to the question, *what debt or part of what debt has the surety guaranteed?* This being ascertained, no difficulty remains. It is a certain consequence that when he has paid *that* debt, or the *part* of that debt which he has guaranteed, he is entitled to the benefit of subrogation and its equivalents, and not until then.

In prosecuting this enquiry in doubtful cases, one main question must be, *what was the nature of the limitation?*

at nearly the same time, indicate that Schuchardt & Sons were not inclined to take and pass to the credit of the bank bills drawn by the bank itself upon foreign houses unaccompanied by bills of lading. This created an additional hazard for which the pledge of the bonds was not a sufficient protection, and in such cases they indicated that additional security would be required.

SECOND.—The real and avowed object of the giving and taking of the pledge of the bonds was to *increase the volume* of this business, that is, the dealing in merchandise bills (letter of December 4th, 1871, pp. 33, 34), and any such increase of volume involved the possibility of hazard in two directions: (1) Bills might not be remitted. (2) Bills remitted might not be paid at maturity. It was against these consequences *in both forms* that Schuchardt & Sons *needed*, and asked for, security.

THIRD.—It was against these consequences, *in both forms*, that the pledge was specifically and in terms made. They were to be security "*en cas de découvert*" (Cavaroc's Letter, pp. 27, 30). It is certain that this "*cas de découvert*" would be produced precisely the same by the payment by Schuchardt & Sons of a protested bill and the charging the amount over against the bank in its account, as by a draft on that firm by the bank in advance of the remittance of bills and a failure to remit such bills. Otherwise the bank would have the right to draw to the extent of $100,000 in advance of remittances, while there might be an actual balance against it created by the charging back of protested bills of $100,000—a supposition absolutely inadmissible. It will, therefore, be perceived that the credit "*a découvert*" of $100,000 could be as well exhausted by protested bills as by failure to remit bills which had been drawn against by anticipation.

FOURTH.—The business, therefore, which was intended to be advanced and facilitated by this credit, necessarily involved, even if the credit were strictly limited to $100,000

for the time being, a possible adverse balance of a sum *indefinitely* exceeding the $100,000; and, as already observed, it was against these consequences that Schuchardt & Sons needed, asked for, and obtained the security.

FIFTH.—Cavaroc & Son did not, in any form, *expressly* limit the extent of the guaranty, and there is no little difficulty in finding any *implied* limit to it, but the language of his letter, by which he pledges "a portion" only of the bonds, taken in connection with the fact of the limitation of the credit fixed by Schuchardt & Sons, furnished some foundation for an implication. And the language of the subsequent resolution adopted by the bank in presence of Cavaroc shows that such was his understanding.

SIXTH.—Indulging the supposition that the pledge was limited in *some* form, the question is how it was limited. The contention of the appellant is that it was limited to *part of the debt*, that is, to $100,000 of the whole debt, but this *cannot* be so, at least it cannot be so at all times; for if it were it would be true of the whole debt as soon as it reached the amount of the $100,000. It would be *that* debt which was secured, and if so as soon as that was paid by the debtors the pledge would be discharged. But this would at once destroy the *continuing* character of the guaranty, whereas it is agreed even by the appellants that as soon as liabilities incurred by the bank were discharged by payments, further drafts *a découvert* could be made and would be secured by the pledge. Will it be said that the whole debt must be taken at the time when the transactions cease, and that the part secured is $100,000 of the debt as it then exists? But this will not answer. It is altogether too vague and there is absolutely nothing in this language or the situation of the parties to support the notion. When would the transactions *cease?* Would it be when the last draft is drawn, or when the last payment is made? If the former, when would the last draft be drawn? One is drawn to-day; and is the last until another is drawn, when it ceases to be the last. If the latter, when is the last pay-

ment made? The same difficulty would arise in this alternative. Will it be said that the debt must be taken at the time of *insolvency* and the security be declared to be for $100,000 of the debt as it then stands? But how is the date of insolvency to be fixed, and what is there in the circumstance of *insolvency* to show that any party had that event in view as being the period at which the whole debt was to be ascertained in order to know of *what* debt a part was guaranteed? The day before insolvency then is, let it be supposed, an adverse balance of $150,000, and the debtor pays $50,000. This, as all concede, has no effect on the guaranty. That stands for the $100,000 yet remaining due. But suppose the payment is not made until the day after insolvency? Then, according to the suggested view, the payment must be *apportioned*, and part of it go in relief of the guaranty, so that while $100,000 would still remain due the bonds would be held for only $83,333. It is impossible to believe that such a result was in the contemplation of the parties. Will it be said that the whole debt, *part* of which is thus to be declared guaranteed, must be taken to be that which the creditors at any time seeks to enforce? The same difficulties would be encountered and others beside, for he might never seek to enforce it, but hold his pledge, leaving it to the pledgor or his representatives to redeem.

But if we say that the guaranty was not limited to *part* of any debt, but covered the *whole* debt which should remain unpaid, with a proviso limiting the liability of the surety to $100,000, no difficulty of any description presents itself. The creditor may forbear any resort to the bonds until he has exhausted the estate of the debtor, and then collect from the bonds the residue. If they pay the whole residue the owner of them is entitled indeed to the nominal right of subrogation in respect of further payments from the debtor's estate, but the right would be a barren one, inasmuch as that estate is exhausted. If the creditor, as he may, chooses, before exhausting the debtor's estate, to resort to the bonds, he will not be obliged to account to the surety for subsequent payments by the debtor's estate, unless the pledge paid the whole debt; but the pledgor could at any time reclaim his bonds and the entire right of

subrogation by paying, not $100,000, but the whole debt in case it exceeded that sum.

SEVENTH.—It being, therefore, so extremely difficult, if not impossible, to say what the debt is of which a *part* was designed to be secured by the limitation of the guaranty, the notion that the design was to secure *part* of any debt must be abandoned, and the other alternative accepted, namely, that the design was to secure the *whole* unpaid balance of the debt with a limitation of responsibility to the sum of $100,000. And, as we have endeavored to show above and also in our main brief, this interpretation is in entire accordance with every indication which the contract and the situation afford of the intent of the parties. It is a circumstance not wholly without significance that when the bank proposed to indemnify Cavaroc, as appears by the resolution often referred to, it seems to have been assumed by all, Cavaroc included, that he would probably be called upon to pay $100,000. That was the amount for which securities were to be placed in his hands. If the contention of the appellants be correct, his liability could not have been estimated at anything near that sum. It would have been cut down at least one-half by dividends from the estate of the bank, the probable amount of which both the bank and Cavaroc well knew.

LASTLY.—One suggestion made in the Court below by the appellants is not referred to in my principal brief. It is that as the adverse balance against the bank arises from the charging over to its account of the amount of protested *clean* bills, that is, bills drawn by the bank itself on foreign houses unaccompanied by bills of lading, the transactions are not covered by the terms of the pledge, which embraced only such drafts as were to be drawn in anticipation of the remittance of merchandise bills. This would be a very erroneous and unreasonable interpretation of the intentions of the parties. What the bank desired, and only desired, was a *credit*, that is, permission *to draw without funds*. To be sure the understanding was, and the promise of the bank was, that it would remit merchandise

bills to cover such drafts. The suggestion is that if it *wholly* failed to remit *anything* it may be liable; but that if it remitted *something different* from what it agreed to, although wholly valueless, the transaction became an unprotected one, and the credit *a découvert* continued unaffected by it! It is enough to say in answer to this that the only way in which a liability could arise against the bank, according to the contemplated course of business, was by the payment of the *drafts* of the latter; that when a draft came unaccompanied by a bill of lading, no matter what else it might be accompanied with, it was a draft *a découvert* within the meaning of the contract, and would go towards exhausting the credit; that if subsequently merchandise bills were remitted equalling the amount of such drafts the credit would be restored, and Schuchardt & Sons could not know when any draft was presented to them unaccompanied with a merchandise bill but that remittances of such bills would follow. And so long as a sufficient margin of the $100,000 credit existed they would be bound to honor all drafts by the bank.

The whole matter really comes down to this: The bank wanted to draw *without a drawing balance* in its favor. Schuchardt & Sons were willing to give this privilege on being secured against its possible hazards, and for this the security was given. It accordingly stands to secure any loss which has arisen in consequence of those hazards.

But to this possible argument of the appellants, which is now under notice, the evidence furnished by the resolution of the Banking Association of Sept. 20th, 1873, so decisively indicating the understanding of the parties to the contract, is a conclusive answer. The suggestion that this was an admission made after the contract was made and that it could not alter its terms is idle. Nobody asserts that it can alter the terms of the contract. But the question is *what were the terms* of that contract, and to this point the evidence is at once relevant and decisive.

JAMES C. CARTER,
Of Counsel for Chas. M. Fry, Appellee.

Supreme Court of the United States.

EDWARD H. REYNES, sole surviving Assignee of Charles Cavaroc & Son,
Appellant

against

CHARLES M. FRY, Trustee in Bankruptcy of Shuchardt & Sons,
Appellee.

FREDERIC DUMONT, August Henry Reine and Jean David Mockel,
Appellants,

against

CHARLES M. FRY, Trustee in Bankruptcy of Shuchardt & Sons,
Appellee.

Affidavit showing execution of judgment appealed from.

STATE OF NEW YORK,
City and County of New York, } ss. :

CHARLES M. FRY, being duly sworn, deposes and says :

That he is the appellee in the two above appeals.

That the final decree fixing the amount of deponent's lien on the bonds in suit was dated and entered on or about the 5th day of March, 1884.

That thereafter and on the 10th day of April, 1884, in pursuance of the provisions of said decree, this deponent turned over to John E. Parsons, attorney for the appellant Reynes, and Edgar A. Hutchins, attorney for the appel-

lants Dumont and others, one hundred and forty of the bonds in suit, and paid to them the sum of forty-five thousand dollars, and received receipts substantially in the following form :

"Received of Mr. Charles M. Fry, Trustee in Bankruptcy of Frederick Schuchardt & Sons, 140 bonds of the City of New Orleans, each for $1,000, Nos. 361 to 396, 300 to 360, 285, 287, 288, 290, 292, 296, 298, 397 to 432, with the interest coupons thereto attached, being balance of bonds left in his hands after sale, and which are delivered in pursuance of within decree."

This receipt was endorsed on the back of a certified copy of such decree, and was signed by John E. Parsons, as attorney for the appellant Reynes, and by Edgar A. Hutchins, as attorney for the appellants Dumont & Co.

The receipt for the money was substantially as follows:

Received of Mr. Charles M. Fry, Trustee, &c., $45,000 on account of proceeds of coupons collected on bonds in suit of Dumont *vs.* Fry and paid over in pursuance of within decree.

This was likewise endorsed on the back of a certified copy of the said decree and signed by the aforesaid attorneys.

That shortly thereafter, and on or about the 24th day of April, 1884, this deponent made up his account in pursuance of the terms of the aforesaid judgment, and caused the same to be duly filed with the Clerk of the U. S. Circuit Court for the Southern District of New York, and served upon the attorneys for both the appellants, to wit: John E. Parsons, attorney for the appellant Reynes, and Edgar A. Hutchins, attorney for the appellants Dumont and others.

Deponent attaches hereto a certified copy of such account, which is marked Exhibit "A," and which deponent avers to be a true copy of his original account as filed and served upon said attorneys.

Deponent further says that said account was accepted by the appellants as satisfactory in every respect. And shortly after its filing and service, deponent turned over the

bonds in his possession as shown by the said account and assigned the judgments therein set forth and paid the balance of cash, which judgments were assigned to John E. Parsons, attorney for the appellant Reynes, and Edgar A. Hutchins, attorney for the appellants Dumont and others, and the bonds were delivered to them and the balance in cash paid to them, and deponent received from them a receipt substantially as follows:

"CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

FREDERICK DUMONT,
Plaintiff,

against

CHARLES M. FRY, Trustee, &c., and others,
Defendants.

Received of Charles M. Fry, trustee, the following: 30 bonds of the City of New Orleans for $1,000 each, numbered 1492 to 1499 inclusive, and 1686 to 1707 inclusive; 10 bonds of the City of New Orleans for $50 each, numbered 1665 to 1667 inclusive, and 1962 to 1968 inclusive; 9 bonds of the City of New Orleans for $5 each, numbered 1122, 1123, and 1310 to 1316 inclusive; also in cash the sum of $5,627.30; also an assignment of all the interest of Charles M. Fry in all balances due upon the judgments rendered in the following named and numbered causes:

Charles M. Fry *vs.* City of New Orleans, No. 9269.
Same *vs.* Same, No. 9476.
United States *ex rel.* Charles M. Fry *vs.* The City of New Orleans, No. 9553.
Same *vs.* Same, No. 9652.

Charles M. Fry *vs.* Same, No. 9983.
Same *vs.* Same, No. 10009.
United States *ex rel.* Charles M. Fry *vs.* Same, No. 10181.
Same *vs.* Same, No. 10182.

The same bonds being delivered, the said assignment executed and the money paid over in pursuance of judgment made and entered in this action on the 5th day of March, 1884; and we acknowledge the same to be a full compliance by the said Fry with the provisions of the aforesaid judgment, and a full payment of all moneys directed to be paid or securities transferred to us."

Which receipt was duly signed by the said John E. Parsons, attorney for the appellant Reynes, and the said Egar A. Hutchins, attorney for the appellants Dumont and others.

And thereupon this deponent supposed the matter closed, as the petitions on appeal herein were not signed or presented until the month of September, 1885, more than sixteen months after such payments were made.

CHARLES M. FRY.

Sworn to before me this 19th day of January, 1889.

WILLIAM C. BOWERS,
Notary Public,
N. Y. Co.

[SEAL.]

Exhibit A.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FREDERICK DUMONT,
Plaintiff,

against

CHARLES M. FRY, Trustee, &c., and others,
Defendants.

In pursuance of the final decree made in this action, directing me to deliver and pay the balance of the bonds in suit, and all moneys that have come into my hands, less my necessary expenses in collecting the same, as the proceeds of coupons on said bonds, or interest on said proceeds, and also all detached coupons, and all claims and judgments on the coupons, and the benefit of all proceedings for the collection of coupon moneys, and all moneys which have been collected by me, and which have not been previously accounted for, with interest thereon, to Edgar A. Hutchins, the attorney for the complainants, and Man & Parsons, the attorneys for the defendant, E. H. Reynes, surviving assignee of Charles Cavaroc & Son, upon the joint receipt of said attorneys :

I, CHARLES M. FRY, do render the following account :

On the 7th day of April, 1884, I delivered to John A. Shields, the Master appointed to sell the bonds in suit, ninety-two of such bonds being the number sold by him in pursuance of the terms of the decree.

On the tenth day of April, 1884, I delivered to Edgar A. Hutchins, attorney for the complainant, and Man & Parsons, attorneys for E. H. Reynes, surviving assignee of

Charles Cavaroc & Son, upon their joint receipt, the balance of such bonds, one hundred and forty in all.

I have received, since my last account, from Rouse & Grant, the attorneys employed at New Orleans to prosecute the unpaid coupons on the aforesaid bonds, in settlement of the coupons due June and December, 1875, the following bonds of the City of New Orleans:

22 Bonds for $1,000 each, 1686/1707	$22,000
7 Bonds for $50 each, 1962/8	350
7 Bonds for $5 each, 1310/16	35
	$22,385

which are in my hands ready for delivery.

I have also received, since my last account, from Rouse & Grant, the aforesaid attorneys, in settlement of the coupons due December, 1882, the following bonds of the City of New Orleans:

8 Bonds of $1,000 each, 1492/9	$8,000
3 Bonds of $50 each, 1665/7	150
2 Bonds of $5 each, 1122/3	10
	$8,160

which are in my hands ready for delivery.

The following is an account of all moneys received by me as the proceeds of coupons on the aforesaid bonds which were the subject matter of this action, and of all moneys collected by me on account of said bonds, and not heretofore accounted for, less necessary expenses:

1883		
April 27,	Received from Rouse & Grant	$4,377.16
June 30,	" Interest from Bank of New York	684.16
Dec. 22,	Received from Rouse & Grant	22,971.25
Dec. 31,	Received Interest from Bank of New York	737 26

1884.		
Jany. 9,	Received from Rouse & Grant....	403 30
Mch. 3,	" " " " "	16,045 86
" 4,	" " " " "	5,985 00
April 15,	" " " " " (balance in their hands).....	37 16
April 17,	Received Interest from the Bank of New York.....	558 90
		$51,800 05

EXPENSES.

1884.			
Jany. 8,	Paid rent of Safe.....	$100 00	
April 10,	" E. A. Hutchins, Attorney for Complainant, and Man & Parsons, Attorneys for E. H. Reynes, Assignee, &c.....	45,000 00	
April 18,	Paid express charges on coupons sent to New Orleans and Bonds received.....	67 75	
April 23,	Platt & Bowers, for legal services.....	1,000 00	
	Paid copying and lithographing accounts...	5 00	46,172 75
	Balance cash on hand.		$5,627 30

I have written to Rouse & Grant to send me a statement of all suits and judgments on coupons on these bonds with necessary form of assignment.

The following is a copy of their reply: "In the Circuit Court of the United States for the Eastern District of Louisiana:

Charles M. Fry *vs.* City of New Orleans, No. 9269.
Same *vs.* Same, No. 9476.
U. S. *ex rel.* Fry *vs.* Same, No. 9553.
Same *vs.* Same, No. 9652.
Charles M. Fry *vs.* Same, No. 9983.
Same *vs.* Same, No. 10009.
U. S. *ex rel.* Fry *vs.* Same, No. 10181.
Same *vs.* Same, No. 10182.

I, Charles M. Fry, trustee of Messrs. Schuchardt & Sons, hereby assign, set over and transfer unto

"all my right, title and interest in and to all balances due upon the several judgments rendered in the above-named and numbered causes, with full power of subrogation to said of all my rights and privileges thereunder."

I personally know nothing as to such suits or judgments or the amounts uncollected, but am ready to execute the assignment so sent by them.

There are no other bonds, funds, moneys or claims in my hands in any manner connected with the bonds in suit in this action, or their coupons.

Dated New York, April 24th, 1884.

CHAS. M. FRY.

STATE OF NEW YORK, }
City and County of New York, } ss.:

CHARLES M. FRY, being duly sworn, deposes and says: That the foregoing account is true to the best of his knowledge and belief.

CHAS. M. FRY.

Sworn to before me this }
24th day of April, 1884. }

HENRY C. BOWERS,
Notary Public,
N. Y. Co.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States, in and for the Second Circuit and Southern District of New York, do hereby certify that I have compared the preceding with the original account rendered by Charles M. Fry in pursuance of judgment in case entitled Frederic Dumont *vs.* Charles M. Fry, on file and of record in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of New York, in the District and Circuit above
[SEAL] named, this 17th day of January, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and thirteenth.

JOHN A. SHIELDS,
Clerk.